[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
DEFENDANT,

AND

WELSH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1947. SYDNEY, *April* 2; *May* 8. Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Defence—Air Force—Officer—Deferred pay—Alteration of rate after enlistment and before discharge—Right to deferred pay—Contractual—Statutory—Regulation—Retrospective operation—"Rights existing"—Validity—Acts Interpretation Act 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *s.* 48 (2)—*Defence Act* 1903-1941 (*No.* 20 *of* 1903—*No.* 4 *of* 1941), *s.* 12—*Air Force Act* 1923-1941 (*No.* 33 *of* 1923—*No.* 12 *of* 1941)—*Air Force Regulations* (*S.R.* 1927 *No.* 161—1945 *No.* 105), *regs.* 31, 32, 72, 541, 548, 551, 646 (4)—*Air Force* (*War Financial*) *Regulations* (*S.R.* 1943 *No.* 93—1944 *No.* 134), *regs.* 2 (1), 5, 8 (1), (4), (7).

On 23rd September 1939 the Air Board advertised in daily newspapers inviting applications for commission in the Citizen Air Force. The respondent applied to the Board and was forwarded an application for commission which set out details of pay and allowances which were at the rates then prescribed by the *Air Force Regulations*. Pursuant to his application the respondent was commissioned on 16th October 1939. He was discharged on 10th September 1945.

Regulation 31 of the *Air Force Regulations* provides that "Any person who has been a member" of the Air Force "may, after having ceased to be a member, recover from the Commonwealth by suit . . . any moneys which under his engagement or by any agreement with the Commonwealth are due to him."

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Regulation 32 provides that "The appointment or promotion of an officer under these regulations shall not create a civil contract between the King or the Commonwealth and the officer."

On 13th April 1943 the *Air Force (War Financial) Regulations* were notified in the *Gazette*. Regulation 2 (1) provided for their retrospective operation as from 6th October 1939. Regulation 5 (1) provided for the repeal of anything in the then existing *Air Force Regulations* inconsistent therewith. Regulation 5 (2) provided that "If, in respect of the period from and including the sixth day of October 1939" to the date of notification "the total amount of the daily pay and allowances prescribed by the *Air Force Regulations* as payable to any member . . . was higher than the total amount of daily pay and allowances payable under these regulations, the member shall not be entitled to recover the amount of the difference." Regulation 8 had the effect of depriving the respondent of certain deferred pay to which under the regs. 548 and 551 of existing *Air Force Regulations* he would have been entitled.

Held, (1) by the whole Court, that the respondent had no right arising out of contract or agreement to recover the moneys claimed to be due to him in respect of deferred pay accruing between the date of his commission and the date of the notification of the *Air Force (War Financial) Regulations*.

Held, (2) by *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that reg. 31 of the *Air Force Regulations* conferred no rights on the respondent as at 13th April 1943 as he had not then "ceased to be a member" within that regulation. Accordingly regs. 2 (1), 5 and 8 of the *Air Force (War Financial) Regulations* were not avoided by s. 48 (2) of the *Acts Interpretation Act* 1901-1941.

Decision of the Supreme Court of New South Wales (Full Court): *Welsh* v. *Commonwealth*, (1946) 47 S.R. (N.S.W.) 199; 64 W.N. 78, in part affirmed, in part reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by Peter Lawrence Welsh against the Commonwealth of Australia to recover certain moneys claimed by him to be due and owing by the Commonwealth to him as a former officer of the Royal Australian Air Force a special case, stated pursuant to the provisions of ss. 55-57 of the *Common Law Procedure Act* 1899 (N.S.W.), was substantially as follows:—

1. On 23rd September 1939 the following advertisement was published in the *Sydney Morning Herald*, a daily newspaper published in Sydney.

"*Vacancies for Flying Instructor*: Applications are invited from British Subjects of pure European descent, aged 32-45 years, for

Commission in the Citizens Air Force, for employment as flying instructors, anywhere within Australia, for the duration of war. Applicants must be past or present holders of Civil 'A' or 'B' Licenses, who have had more than 300 hours flying. Successful applicants will be granted rank of Pilot Officer, while undergoing a Training Course (approximately eight weeks) with pay at £330 and £36 10s. Deferred Pay per annum. After successful graduation they will be promoted to Flying Officer with pay at £421 and £36 10s. Deferred Pay per annum. Free quarters and rations provided or an allowance of £86 10s. (single) or £114 (married) per annum. Particulars and Application Forms available from Secretary, Air Board, Melbourne, S.C.1. Applications close October 2, 1939."

2. That advertisement was published with the authority of the Air Board established under regulations made under the *Air Force Act* 1923 and the rates of pay therein specified were the rates prescribed by the *Air Force Regulations* made under that Act and then in force for pilot officers and flying officers respectively.

3. On the said 23rd September 1939 the plaintiff forwarded to the Air Board in reply to the advertisement a letter of which the following is a true copy: "Would you be good enough to send me, return mail, application forms for position of flying instructor, as per advertisement in 'Herald' on above date."

4. In answer to that letter of the plaintiff the Air Board forwarded to him an application form for a Commission in the Royal Australian Air Force to be completed by the plaintiff and returned to the Air Board together with a document in the following terms:

"NOTES FOR THE INFORMATION OF CANDIDATES FOR APPOINTMENT AS FLYING INSTRUCTORS IN THE R.A.A.F. (CIVIL AIR FORCE).

ELIGIBILITY.

Applicants must be between the ages of 32 and 45 years. They must be of pure European descent, and must be British subjects, and the sons of parents both of whom are (or, if deceased, were at the time of their death) British subjects. Applicants must be present or past holders of civil 'A' or 'B' licences, who have more than 300 hours flying.

RANK ON APPOINTMENT.

Successful applicants will be granted commissions in the Citizens Air Force with the Rank of Pilot Officer. After successful graduation from an instructional course of approximately eight weeks they will be promoted to the rank of Temporary Flying Officer with pay of that rank.

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PERIOD OF APPOINTMENT.

The appointments will be for the duration of the war.

RATES OF PAY.

[The rates of active and deferred pay for officers up to and including the rank of Flight Lieutenant were then set out.]

UNIFORM ALLOWANCE.

A uniform allowance will not be payable; but members will receive a free issue of uniform on the authorized scale.

SUPERANNUATION.

The provisions of the *Superannuation Act* will not apply. Members will be covered, however, by the same provisions regarding compensation as are applicable to the members of the Citizen Air Force who sustain injuries or become incapacitated in the performance of their duties. This is based on the degree of incapacity.

DUTIES.

Successful applicants will be required for duty anywhere in Australia; the initial course of Flying Instructor training being held at No. 1 Flying Training School, Point Cook, Victoria, commencing early in October 1939.

LEAVE.

Providing the exigencies of the Service permit, an officer may be granted recreation leave on full pay up to a maximum of twenty-five days per annum, and granted sick leave in accordance with the authorized scale. Applications close with Secretary, Air Board, Melbourne, S.C.1 on 2nd October, 1939."

The rates of pay specified in the document were the rates prescribed by the *Air Force Regulations* made under the Act and then in force for the respective ranks in the document mentioned.

5. The plaintiff completed the form of application and returned it to the Air Board on 29th September 1939. The form was an application by the plaintiff for a commission in the General Duties Branch of the Citizen Forces of the Royal Australian Air Force.

6. On 4th October 1939 the plaintiff wrote and sent to the Air Board a letter of which the following is a true copy: " With reference to my application as an instructor to the R.A.A.F. dated the 29/9/39, am enclosing a trade reference in addition to one from a well-known flying school at Mascot.

I would be grateful if you would give my application your earliest consideration as I have a position in view elsewhere."

7. After 29th September 1939 and before 9th October 1939 the Air Board sent to the plaintiff an undated telegram in the following terms: "Reference your application entry air force report to interviewing officer for instructions at R.A.A.F. Recruiting Centre, Technical College, Harris Street, Ultimo, Sydney, on ninth or tenth October for interview stop after interview await further instructions stop if successful you will be required to report Point Cook sixteenth October for instructors course."

9. On 11th October 1939 the Air Board sent to the plaintiff a telegram in the following terms: "You have been selected on probation for instructors' course Point Cook stop report Air Force Headquarters Victoria Barracks Melbourne 9 a.m. 16th October 1939 stop collect travelling warrant as instructed."

11. The plaintiff was appointed to commissioned rank on probation as a pilot officer in the Citizen Air Force with effect from 16th October 1939.

12. On 17th January 1940 the plaintiff was promoted to the rank of temporary flying officer.

13. On 4th July 1940 the probationary appointment of the plaintiff to commissioned rank and his promotion to the rank of flying officer were both confirmed.

14. On 1st January 1941 the plaintiff was promoted to the rank of temporary flight lieutenant with pay.

15. On 1st December 1943 the plaintiff was promoted to the rank of temporary squadron leader and retained this rank until 10th September 1945.

16. On 12th September 1942 the plaintiff embarked for the Territory of Papua where he served on operational flights against the enemy over the high seas and the Mandated Territory of New Guinea until 24th December 1942 when he was returned to Australia on account of illness.

17. On 10th September 1945 the plaintiff was discharged from the Royal Australian Air Force and then ceased to be a member of it.

18. On 16th October 1939 when the plaintiff was first appointed to commissioned rank as aforesaid reg. 646 (4) of the regulations made under the *Air Force Act* 1923 provided as follows:—

> "Notwithstanding anything contained in this Division of this Part of these Regulations, a member of the Citizen Air Force, while serving under regulation 445, shall be paid the rates of active pay and deferred pay and receive the allowances prescribed for a member of the same rank in the Permanent Air Force."

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and reg. 445 provided as follows :—

"(1) The Governor-General may in time of war, by proclamation, call out the Citizen Air Force or any part thereof for war service.

(2) The proclamation shall state the reason for calling out the Citizen Air Force.

(3) If the Parliament is sitting the reason for calling out the Citizen Air Force shall forthwith be communicated by the Governor-General to both Houses of the Parliament.

(4) If the Parliament is not sitting at the date of the issue of the proclamation it shall be summoned to meet within ten days after that date."

On 3rd May 1944 reg. 646 (4) was amended by omitting the words " regulation 445 " and substituting therefor the words " section 46 of the *Defence Act*."

19. On 2nd September 1939 the Governor-General of the Commonwealth of Australia acting under powers conferred on him by the *Defence Act* 1903-1939, issued a proclamation calling out the Citizen Air Force for war service.

20. The daily rates of deferred pay for an officer of the Permanent Air Force (General Duties Branch) on 16th October 1939 were prescribed by reg. 548 (1) (*a*) of the regulations made under the *Air Force Act* 1923, and it was provided by reg. 549 (1) that deferred pay at the prescribed rates should be credited to the account of each officer annually.

21. Interest on deferred pay was provided for by reg. 551 (1), (2) of those regulations at specified rates.

22. Deferred pay and interest was credited to the plaintiff under the regulations. Such deferred pay and interest was credited as from 16th October 1939 until 30th June 1943. On 30th June 1943 such credits of deferred pay and interest were cancelled with effect from 16th October 1939.

23. For the period from and including 16th October 1939 to and including 1st April 1942 the plaintiff was paid active pay in accordance with the rates of pay prescribed by the *Air Force Regulations*.

24. For the period from and including 2nd April 1942 to the date of his discharge the plaintiff was paid active pay, and was credited with, and before this action, was paid deferred pay and interest thereon at the rates prescribed by the *Air Force* (*War Financial*) *Regulations* made under the *Air Force Act* 1923-1941.

25. Since the discharge of the plaintiff from the Royal Australian Air Force he has requested the defendant to pay to him deferred pay

and interest thereon in accordance with the rates specified in pars. 4, 20 and 21 hereof but the defendant claims that it is under no liability to pay the same and has neglected and refused and still neglects and refuses to pay to the plaintiff the said deferred pay or interest thereon or any part thereof and the whole of such deferred pay and interest remains unpaid to the plaintiff.

26. Regulation 31 of the *Air Force Regulations* is as follows:

"Any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him."

27. The plaintiff now claims payment by the defendant to him of the following sums:

Deferred Pay under *Air Force Regulations*, reg. 548.	
As pilot officer 1939 October 16 to 1940 January 1, 76 days at 2s. per day	£7 12 0
As flying officer 1940 January 1 to 1941 January 1, 366 days at 2s. 6d. per day	44 10 0
As flight lieutenant 1941 January 1 to 1943 December 1, 1065 days at 4s. per day	213 0 0
As squadron leader 1943 December 1 to 1945 September 10, 648 days at 4s. 6d. per day	145 16 0
Interest under *Air Force Regulations*, reg. 551 at 3½ per cent.	
On £29 17 0 for one year to June 30 1941	1 1 0
„ 67 10 0 „ „ „ „ June 30 1942	2 7 3
„ 142 17 3 „ „ „ „ June 30 1943	5 0 0
„ 220 17 3 „ „ „ „ June 30 1944	7 14 0
„ 307 6 0 „ „ „ „ June 30 1945	10 15 0
„ 400 3 9 „ „ „ „ September 30 1945 ..	3 10 0
	£441 5 3

28. The plaintiff claims that the facts stated in the preceding paragraphs hereof constitute an agreement between the plaintiff and the defendant whereby the defendant agreed to pay to the plaintiff deferred pay and interest thereon in accordance with the rates stated in the document set out in par. 4 hereof and that such deferred pay and interest are moneys which by an agreement with the defendant are due to him.

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29. The plaintiff further claims that the moneys specified in par. 27 hereof are moneys due to him under his engagement as an officer in the Royal Australian Air Force.

30. It is agreed that all regulations made under the *Air Force Act* 1923 or under that Act as amended shall be deemed to be incorporated in and shall form part of this special case.

On 13th April 1943, by Statutory Rules 1943 No. 93, the *Air Force (War Financial) Regulations* were gazetted. By reg. 2 these regulations, so far as relevant, are to be deemed to have come into operation as on and from 6th October 1939, and, by reg. 5, they are to have effect notwithstanding anything contained in the *Air Force Regulations*, and any provision of those regulations which was inconsistent with them should, to the extent of the inconsistency, be deemed not to apply (subject to certain exceptions not material to this report). By regs. 7, 8, read in conjunction with the first schedule, it was provided, in effect, that a member should receive certain pay (not including any deferred pay) up to the date of his embarkation for service outside Australia, and should be entitled to deferred pay only after the date of his embarkation.

Other relevant statutory provisions and regulations are sufficiently set forth in the judgments hereunder.

The questions reserved for the opinion of the Court were :—

1. Whether the moneys claimed by the plaintiff in par. 27 or any part thereof were moneys due and payable by the defendant to the plaintiff under an agreement with the defendant within the meaning of reg. 31 of the *Air Force Regulations* or s. 12 of the *Defence Act* 1903-1941 ?

2. Whether the moneys claimed by the plaintiff in par. 27 were moneys due and payable by the defendant to the plaintiff under his engagement in the Royal Australian Air Force ?

3. If questions 1 and/or 2 be answered in the affirmative what amount is due by the defendant to the plaintiff ?

The Full Court of the Supreme Court (*Jordan* C.J., *Davidson* and *Roper* JJ.) answered the questions as follows :—

1. No.

2. Yes, subject to the prospective operation of the *Air Force (War Financial) Regulations* No. 93 of 1943, that is to say so much of the said moneys as relate to the period of the plaintiff's engagement prior to 13th April 1943 are so due and payable.

3. To be left to be calculated by the parties.

From this decision the Commonwealth, by special leave, appealed to the High Court.

Mason K.C. (with him *Ferguson* K.C. and *Macfarlan*), for the appellant. Until the date of his discharge the respondent had no existing right whatsoever; he had no right to bring any proceedings in the court. His rights are determined as at that date. Not then having any rights it follows that he was not prejudiced by the *Air Force (War Financial) Regulations* promulgated in April 1943. The provisions of the regulations that there shall be paid to a member of the forces a certain sum conferred no right whatsoever. The only right acquired by the member was under reg. 31 that when he ceased to be a member he could sue. The contest is: Is this a right that is given by reason of the provisions for pay, the payment of which is postponed under reg. 31, or is the true position that, under the regulations with regard to pay, no right is given whatsoever and that it is simply a matter of provision made in the estimates, an authorization for payment to be made out of public funds, and appropriations being made accordingly. Omitting reg. 31, the position is that there was no right of action and no claim could be made at all except on the bounty of the Commonwealth. The right conferred by reg. 31 is a right to sue at a future date, when discharged. Regulation 32 is declaratory of the common law. Regulation 31 and reg. 32 are in such close position to one another as to show that by reg. 31 it was not intended to alter the common law. All that was intended was that when a person ceased to be a member of the forces he should be entitled to bring an action. Although the word "agreement" appears in the regulation it is not used as meaning "contract" but rather as referring to a unilateral undertaking; an agreement by the person but not by the Commonwealth. The proper interpretation of reg. 541 of the *Air Force Regulations* is that a member of the Forces has no right except those given to him by the regulations. Those regulations expressly provide that after a person ceases to be a member of the Forces he shall be entitled to sue. That right to sue is in respect of the rates of pay prescribed for the rank which he held from time to time under the regulations made from time to time and subject to such emendations or alterations as may have been made from time to time. The provisions in the regulations that a member's pay shall be a specified amount give no right whatsoever; the only right which a member has is the right conferred by reg. 31. That regulation is not a disability but is a right given to members for the first time. The *Air Force (War Financial) Regulations* are not expressed in such a way as to infringe the provisions of s. 48 (2) of the *Acts Interpretation Act* 1901-1941 (*Australian Coal and Shale Employees Federation* v. *Aberfield*

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Coal Mining Co. Ltd. (1). *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (2)). The regulations apply only to existing members of the Forces and they do not and cannot apply to any person who has ceased to be a member of the Forces. That being so then in the case of a person who has been discharged from the Forces his rights are not affected, prejudicially or otherwise. In any event the provision in the regulations providing that they shall have retrospective effect is capable of being severed and, so severed, there would then remain the valid provision relating to future operation. The provisions for payment are not peremptory. They are an authorization to pay but they do not confer a right to enforcement in any court of law for the recovery of money (*Leaman* v. *The King* (3) ; *Dunn* v. *The Queen* (4) ; *Lucas* v. *Lucas* (5) ; *The Commonwealth* v. *Quince* (6)). The question of what is a right accrued, or what is a right, was dealt with in *Abbott* v. *Minister for Lands* (7) ; *Hamilton Gell* v. *White* (8) ; *Kraljevich* v. *Lake View and Star Ltd.* (9).

Myers (with him *Torrington*), for the respondent. The respondent clearly had an existing right in April 1943. The regulations must be considered as a whole in order to determine whether a right existed on that date. Consideration must be given to whether the regulations were promulgated for the benefit of the members of the Air Force, or whether they were promulgated solely as directions or authority to persons who were entrusted with the payment of the members of the Air Force. It cannot be denied that at common law the engagement of a servant by the Crown is a voluntary one, so that he may be dismissed at pleasure and he has no right to sue for his remuneration. If his engagement is the subject of regulations then whether either the right of dismissal in the Crown or the right of immunity of the Crown from action for his remuneration still continues depends upon the meaning of those regulations. Whether the right to dismiss at pleasure still remains in the Crown depends upon whether the particular regulations were promulgated for the benefit and protection of that employee or as a mere code of directions to the persons entrusted with the control of that particular employee (*Shenton* v. *Smith* (10) ; *Gould* v. *Stuart* (11) ; *R. Venkata Rao* v. *Secretary of State for India* (12)). The same principle must apply when the

(1) (1942) 66 C.L.R. 161, at pp. 175, 176, 183-186.
(2) (1945) 71 C.L.R. 545.
(3) (1920) 3 K.B. 663.
(4) (1896) 1 Q.B. 116, at p. 121 and footnote.
(5) (1943) P. 68.
(6) (1944) 68 C.L.R. 227, at pp. 234, 235, 241, 242, 245, 246.
(7) (1895) A.C. 425, at pp. 429, 430.
(8) (1922) 2 K.B. 422, at p. 431.
(9) (1945) 70 C.L.R. 647, at p. 650.
(10) (1895) A.C. 229, at p. 232.
(11) (1896) A.C. 575.
(12) (1937) A.C. 248.

matter under consideration is whether a right to remuneration exists under the regulations.

[WILLIAMS J. referred to *Reilly* v. *The King* (1)].

That case does not carry the point any further; it is really only an application of this principle. While he was a member of the forces the respondent had a right to a sum of money which was in the nature of a debt. That money accrued due to him from day to day while he was in the forces but was payable at a future date. All the regulations must be considered in conjunction with reg. 31. That regulation itself conceives that moneys are then due and it gives a right of action to recover such moneys. Regulation 31 provides for the right to enforce payment of moneys under an agreement and in order to prevent that from having the effect of creating a contract reg. 32 was inserted merely as a matter of caution. Regulation 31 draws no distinction between active pay and deferred pay. If money was due to a member of the forces on his discharge it must have been due to him from the day on which the pay was earned; the day on which it accrued. It must always have been due from the particular day in respect of which it was payable. Regulation 31 assumes that the money is due and, in effect, poses the question as to how much is due. The fact that that pay is due prior to discharge is recognized by the regulations themselves, e.g. *Air Force Regulations*, regs. 528, 542A and *Air Force (War Financial) Regulations*, reg. 31. The moneys, being due, are due as a right and the fact that they are due as a right is acknowledged by reg. 541 of the *Air Force Regulations*. That regulation means, by implication, that there are vested rights in rates of pay created by the regulations. The provisions of those regulations specially create a vested right, e.g. reg. 31. The true meaning of reg. 541 is that it does not relate to pay as a sum of money but relates to a rate of pay or a rate of deferred pay, that is to say that because a member is being paid a certain rate of pay he shall not have any right to continue to be paid that rate of pay unless the regulations otherwise provide. The words " rate of " as there used apply not only to pay but also to deferred pay, allowance, or any other emolument. Regulation 5 (2) of the *Air Force (War Financial) Regulations* does not operate as a bar to the respondent's action. Whether that regulation is affected by s. 48 (2) of the *Acts Interpretation Act* 1901-1941, or not it cannot affect this action if, as is submitted, the regulations altering the rate of pay are, because of their retrospective operation, themselves involved. The respondent had a right to deferred pay in April 1943, hence it was

(1) (1934) A.C. 176.

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an existing right. Regulation 5 (2) is also invalid because it is obnoxious to s. 48 of the *Acts Interpretation Act*. The proper construction of s. 48 (2) requires that the provision referred to is the provision which is made prejudicial by the retrospective effect of the regulations. The facts of this case amount to an agreement to pay the respondent the money he claims. That being so he is entitled to the money irrespective of the regulations. The regulations do not affect the agreement. The arrangement made between the parties upon the appointment of the respondent could not be altered save by agreement between the parties. Regulation 31 of the *Air Force Regulations* was directed to providing for cases where there had in fact been an agreement as to rates of pay and to enable that agreement to be enforced, provision being made by reg. 32 against the creating of a contract. The word " agreement " as used in reg. 31 refers to an agreement in fact although not to a contract: See also s. 12 of the *Defence Act* 1903-1941. It is conceded that there could not be a contractual arrangement. Regulation 31 recognizes the possibility of the existence of an agreement, as distinct from an engagement, which at least goes so far as to confer what in the case of a contract would be contractual rights, but limited to a power to sue. There is not, in fact, any regulation purporting to affect the respondent's rights under this agreement. In *Reilly* v. *The King* (1) the performance of the contract was discharged because the office having been abolished the contract became impossible of performance.

Mason K.C., in reply. Regulation 541 of the *Air Force Regulations* shows that the Air Board had no power to appoint anyone except in accordance with the regulations. The Board had no power to make any special agreement. There was not any scope anywhere to have a special agreement. No-one had any authority to bind the Commonwealth to give the respondent a special agreement not contemplated by the regulations.

Cur. adv. vult.

May 8. The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from a judgment of the Full Court of the Supreme Court of New South Wales upon a special case stated in an action by P.L. Welsh against the Commonwealth. On 23rd September 1939 the plaintiff answered an advertisement offering commissions in the Citizen Air Force to persons qualified as flying instructors. This advertisement offered deferred pay at a stated rate per annum. In response to the plaintiff's application

(1) (1934) A.C. 176.

for appointment, particulars of rates of pay were forwarded to him, including a rate of deferred pay *per diem*, the deferred pay to be withheld until the completion of the officer's commission, when it was to be paid plus three and one half per cent interest on the yearly balance. The rates stated were the rates provided by existing regulations under the *Air Force Act* 1923. The plaintiff was appointed to commissioned rank as pilot officer as from 16th October 1939. He was subsequently promoted to flying officer and ultimately to temporary squadron leader. The rates of pay set forth in the particulars referred to did not refer to any rank higher than that of flight lieutenant. Thus no rates of pay were mentioned for squadron leaders. The plaintiff was in fact paid the rates of pay provided for his rank by the regulations from time to time. On 12th September 1942 he embarked for the Territory of Papua, where he served on operational flights until 24th December 1942. On 10th September 1945 he was discharged from the Air Force.

Regulations provided that Citizen Air Force officers should be paid the rates of active pay and deferred pay prescribed for members of corresponding ranks in the Permanent Air Force. These provisions applied to the plaintiff.

Under the regulations deferred pay was payable in respect of the whole period of service of an officer, together with interest. The plaintiff received credits of deferred pay annually in accordance with the regulations.

Regulation 32 of the *Air Force Regulations* made under the Act is as follows :—" The appointment or promotion of an officer under these Regulations shall not create a civil contract between the King or the Commonwealth and the officer." This regulation states the principle of the common law applying to the relation between a member of the armed services and the Crown. The engagement of a member of the Forces does not result in the creation of a contract between him and the Crown. He holds his position at the pleasure of the Sovereign ; he may be dismissed at any time ; he can bring no action for damages for wrongful dismissal, nor can he claim to be discharged from his obligations by reason of any alleged breach of duty on the part of the Crown (*Dunn* v. *The Queen* (1) ; *Leaman* v. *The King* (2) ; *The Commonwealth* v. *Quince* (3)).

Regulation 31 of the *Air Force Regulations* is in the following terms :—" Any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his

(1) (1896) 1 Q.B. 116.
(2) (1920) 3 K.B. 663.
(3) (1944) 68 C.L.R. 227.

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engagement or by any agreement with the Commonwealth are due to him." It is under this regulation that the plaintiff makes his claim. He claims alternatively under an agreement and under an engagement with the Commonwealth. His claim is for deferred pay for the whole of his period of service, that is for the period 16th October 1939 to 10th September 1945.

In so far as his case is based on an agreement, it has been rejected in the Supreme Court, where it was held, and in my opinion rightly, that there was no agreement between the plaintiff and the Crown. The plaintiff became bound, by reason of the law applying to service in the forces, to perform the duties of his position, but the Crown made no promises to him. There was no agreement which he can say binds the Crown. His claim depends upon the existence of rights under the *Air Force Act* and the regulations made thereunder.

The defence of the Commonwealth to the action depends upon an amendment of regulations made by Statutory Rules 1943 No. 93 under the *Air Force Act* 1923-1941. These regulations, entitled *Air Force (War Financial) Regulations*, were notified in the Commonwealth *Gazette* of 13th April 1943 and became effective on that date. Regulation 8 (1) provided that deferred pay should be credited to the account of a member in respect of his service on and after the date of his embarkation at rates specified in the First Schedule. Regulation 8 (7) reduced the rate of interest payable for the period from and including 1st January 1941 to 31st December 1942 from three and one half to three per cent per annum and thereafter fixed the interest at such rate as should be from time to time fixed by the Treasurer by notice in the *Gazette*. Regulation 2 (1) of these regulations provided that the regulations should, except where otherwise prescribed in the regulations, " be deemed to have come into operation as on and from the sixth day of October 1939 " ; that is at a date before the date of the notification which, as already stated, was 13th April 1943. Regulation 5 (2) was in the following terms :—" If, in respect of the period from and including the sixth day of October, 1939, to the date of notification in the *Gazette* of these Regulations, the total amount of daily pay and allowances prescribed by the *Air Force Regulations* as payable to any member to whom these regulations apply (other than a member to whom the proviso to sub-regulation (1.) of this regulation applies) was higher than the total amount of daily pay and allowances payable under these regulations, the member shall not be entitled to recover the amount of the difference." This regulation therefore, if it is valid, deprived the plaintiff of any right to recover deferred pay in respect of the period

between his appointment as an officer and the date of his embarkation. The Commonwealth relies upon these regulations as an answer to the plaintiff's claim.

The plaintiff, on the other hand, contends that the regulations are invalid by reason of the provisions of the *Acts Interpretation Act* 1901-1941, s. 48 (2), which is in the following terms :—" Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—(*a*) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; and (*b*) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification, and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect."

It was held in the Full Court that the regulations were void and of no effect in so far as they deprived the plaintiff of the right to recover deferred pay and interest at three and one half per cent thereon in respect of any period before 13th April 1943, but that the regulations were effective as to the period beginning on 13th April 1943. The court relied upon various provisions in the regulations that members of the forces " shall be paid " at certain rates of payment, that money shall be " due " to them, and that they shall be " entitled to " payment at certain rates. It was held that these provisions created a right in a member of the forces as against the Crown to payment at the rates provided in the regulations and that reg. 31 of the *Air Force Regulations* merely postponed the right of recovering moneys which had actually become due to him. It was held that, as the new reg. 5 (2) of 1943 deprived the plaintiff of any right to recover those moneys in respect of a past period, an existing right of the plaintiff was prejudicially affected and that the regulation was *pro tanto* invalid.

Section 48 of the *Acts Interpretation Act* applies in the case of regulations which are expressed to take effect from a date before the date of notification. The provision contained in reg. 2 of the *War Financial Regulations* that the regulations shall be deemed to have come into operation as on and after 6th October 1939 brings these regulations within this description. It is, I think, plain that that they are expressed to take effect from a date prior to the date of notification.

The next question is whether the challenged regulation is of such a character that if it took effect from a date before the date of

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notification it would result in the rights of a person existing at the date of notification being affected in a manner prejudicial to him. What were the rights of the plaintiff existing at the date of notification ?

There are, it is true, many provisions in the regulations which refer to pay being due and to a member of the forces being entitled to pay : see, e.g. the use in the *War Financial Regulations* of the words " entitled to pay " in regs. 13, 14, 15, 16 and 22 and provisions that a member " shall be paid " at certain rates, e.g. regs. 17, 18, 19 and 21 ; and see also references to moneys " due " to a member in reg. 31 of the *Air Force Regulations* and in reg. 31 of the *War Financial Regulations* and in other regulations. There are provisions in the *Imperial Army Act* 1881, e.g. in ss. 136, 137, 138 and 140, which require pay to be paid subject only to authorized deductions or which refer to pay as being due. An argument might have been founded upon these provisions to the effect that the Act conferred a right to pay upon a member of the Forces, but it has never been suggested that such provisions affect in any way the general principle laid down in *Dunn* v. *The Queen* (1) and other cases that a member of the forces has no rights against the Crown in respect of his pay. In my opinion the regulations mentioned and other similar regulations do not result in creating rights which reg. 32 denies to an officer or in giving a right of action beyond that expressly given by reg. 31. Those regulations are intended to bring about the result that the only right of a member of the forces against the Commonwealth shall be a right to sue for moneys payable under the Act and regulations after he has been discharged from the forces, but that otherwise the position at common law shall continue. In my opinion reg. 541 of the *Air Force Regulations* is directed to establishing this position. It is in the following terms :—" A member or other person, for whom provision is made in these regulations shall not be recognized as having any vested rights to any rate of pay, deferred pay, allowance, or any other emolument, except as specially provided herein, and such a member or person shall not be entitled to claim the issue of any emolument, whether under these regulations or as a reserved right, under special conditions which are not herein provided for." In my opinion the effect of this regulation is that the member of the forces has the rights under the regulations read as a whole and no others. The Supreme Court was of opinion that the rights were rights to the pay prescribed but with the right of action postponed. The alternative view is that the only right was

(1) (1896) 1 Q.B. 116.

a right of action which came into existence only when the member was discharged.

In deciding between these two views it is important to remember that what is in issue in the action is the right to recover the moneys sued for. If there is no right to recover the plaintiff must fail. The right to recover is admittedly a right which came into existence only when the plaintiff was discharged from the forces. Regulation 31 of the *Air Force Regulations* is explicit in this respect. Until discharged he had only the possibility of obtaining that right. He did not possess the right itself. Regulation 5 (2) of the *War Financial Regulations* deals expressly and precisely only with the right to recover. It does not purport to deal with any other right. The final words of the regulation are " the member shall not be entitled to recover the amount of the difference." Thus the regulation deals only with a right which had not accrued in the case of the plaintiff when the regulation was notified in the Commonwealth *Gazette*. The regulation therefore did not affect in any manner—prejudicially or otherwise—any right existing at the date of the notification of the regulation. Thus, even if the regulations as a whole can be construed as giving a right to deferred pay in some sense but with the right of recovery postponed until after discharge, the latter right can be affected by a regulation expressed to take effect before the date of notification in the case of any member of the forces who has not been discharged before the date of notification. The result is that the plaintiff's right to recover deferred pay could be and was validly affected by the regulations.

In my opinion the appeal should be allowed and the questions in the case should be answered in favour of the Commonwealth.

I abstain from animadverting upon the action of the Commonwealth Government in altering the regulations notwithstanding the terms of appointment of the plaintiff, and doubtless of other officers. There may possibly have been some compensating advantage for the disadvantageous alteration. The Court has no information on the matter. But the Commonwealth Government was not either bound or invited to defend its action upon any other than a purely legal basis.

RICH J. The question for determination in this appeal is whether a former officer of the Air Force is entitled to certain pay which the *Air Force Regulations* under which he served provided should be paid to him, or whether a regulation notified on 13th April 1943, and purporting to operate retrospectively, was effective to deprive him

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of the right to receive, up to that date, what the earlier regulation had promised. It is not disputed that the 1943 regulation is effective as to any pay accruing after its date. The question is whether it is effective to deprive him of what had previously accrued. It is contended for the Commonwealth that it is, because any promise of pay made to him by the regulations was in law a nullity. It was a promise which the Commonwealth could honour or repudiate at will. Hence, the 1943 regulation, which purports to operate retrospectively did not take away any legal right of the airman (this being prohibited by s. 48 (2) of the *Acts Interpretation Act* 1901-1941), but merely repudiated a promise which was not legally binding upon the Commonwealth, and this, whatever other epithet may be applied to it, is at any rate not illegal.

The general rule is well established that at common law the Crown is not contractually bound to persons whom it takes into its military or civil service, and may at its will dismiss them or refuse to pay them (*The Commonwealth* v. *Quince* (1)). It is equally well established that the Crown's right to treat such engagements as purely voluntary may be effectually abridged or nullified by statute. It is evident that the draftsman of the relevant regulations was fully alive to the common law position. By reg. 32 it was expressly provided that the appointment or promotion of an officer should not create a civil contract between the Commonwealth and the officer. Regulation 31, however, contemplated that, notwithstanding the rule of the common law, moneys might become legally due to a member of the Air Force by the Commonwealth under the regulations, because it expressly provided that such a person, after he had ceased to be a member, might recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him. Regulation 541 provided that a member shall not be recognized as having any vested rights to any rate of pay, deferred pay, allowance, or any other emolument, but this was " except as specially provided herein " and reg. 646 (4) provided that a member of the citizen air force (and the respondent air officer was a member) " shall be paid " the rates of active pay and deferred pay and receive the allowances prescribed for a member of the same rank in the permanent air force. It was his claim to receive this up to the date of the 1943 regulation which was upheld by the Supreme Court. I see no reason for disagreeing with the conclusion of that Court. There is nothing to entitle us to assume that these regulations (which have the force

(1) (1944) 68 C.L.R. 227.

of law) were intended to be read in a sense which would encroach as little as possible on the common law position of the Crown *vis-à-vis* persons in its military service. On the contrary, although the regulation-making authority recognizes that position in reg. 32, in reg. 31 it makes an express provision very substantially encroaching upon it. I see no reason why other express provisions should not be treated as equally valid and operative. A provision, having the force of law, that a member of the forces " shall be paid " is inconsistent with the Commonwealth being at liberty to pay him or not as it chooses ; and the express provision of reg. 31 that an action may be brought by him against the Commonwealth after he ceases to be a member of the forces to recover what is due to him emphasizes the inconsistency.

In my opinion, the appeal should be dismissed with costs.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales in Full Court upon a special case stated pursuant to the provisions of the *Common Law Procedure Act* 1899 (N.S.W.) in an action to recover from the Commonwealth—the appellant here—deferred pay and interest thereon claimed to be due to the plaintiff in the action—the respondent here—as a former officer of the Air Force under the *Air Force Regulations* in force prior to 13th April 1943 when the *Air Force* (*War Financial*) *Regulations* were gazetted.

The questions stated were :—(1) Whether the moneys claimed by the plaintiff or any part thereof were moneys due and payable by the defendant to the plaintiff under an agreement with the defendant within the meaning of reg. 31 of the *Air Force Regulations* or s. 12 of the *Defence Act* 1903-1941 ? (2) Whether the moneys claimed by the plaintiff were moneys due and payable by the defendant to the plaintiff under his engagement in the Royal Australian Air Force ? (3) If questions 1 and/or 2 were answered in the affirmative what amount was due by the defendant to the plaintiff ?

The Supreme Court answered :—Question (1) in the negative ; Question (2) " Yes, subject to the prospective operation of the *Air Force* (*War Financial*) *Regulations* No. 93 of 1943, that is to say so much of the said moneys as relate to the period of the plaintiff's engagement prior to 13th April 1943 are so due and payable " ; and Question (3) was " left to be calculated by the parties " who accordingly calculated the amount in the sum of £247 7s. 10d., whereupon judgment was entered accordingly.

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But for the passing of the *Air Force (War Financial) Regulations* 1943 No. 93, the plaintiff, it was conceded by the Commonwealth, would have been entitled to recover the moneys claimed by him.

The plaintiff's claim against the Commonwealth cannot, however, be supported on any contractual basis for " all engagements between those in the military service of the Crown and the Crown are voluntary only . . . and give no occasion for an action in respect of any alleged contract " (*Dunn* v. *The Queen* (1), citing *Mitchell* v. *The Queen* (2); *R. Venkata Rao* v. *Secretary of State for India* (3)). This principle is enforced by the *Air Force Regulations* which provide (reg. 72) that an officer shall hold his appointment during the pleasure of the Governor-General and (reg. 32) that the appointment or promotion of an officer under the regulations should not create any civil contract between the King or the Commonwealth and the officer and also (reg. 541) that a member or other person for whom provision is made by the regulations should not be recognized as having any vested rights to any rate of pay, deferred pay, allowance or other emolument except as specially provided therein.

But the *Air Force Regulations* (reg. 31) provide that any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him. (See also *Defence Act* 1903-1941, s. 12).

The plaintiff was commissioned as from 16th October 1939 as a pilot officer in the Air Force and was subsequently promoted to the rank of flying officer, flight lieutenant and squadron leader (temporary). He embarked on 12th September 1942 for service overseas and on 10th September 1945 he was discharged from the Air Force, on account of illness, and ceased to be a member of it.

And but for the passing of the *Air Force (War Financial) Regulations* the plaintiff would have been entitled by force of reg. 31 to sue for and recover the deferred pay and interest thereon claimed by him.

The *Air Force (War Financial) Regulations* were made and they were gazetted on 13th April 1943 and except where otherwise provided came into operation on 6th October 1939. Regulation 5 (1) provided: "These regulations shall have effect notwithstanding anything contained in the *Air Force Regulations*, and any provision of those regulations which is inconsistent with these regulations shall, to the extent of the inconsistency, be deemed not to apply to or in relation to a

(1) (1896) 1 Q.B., at p. 122.
(2) (1896) 1 Q.B. 121 (n), at p. 122.
(3) (1937) A.C. 248.

member. . . . (2) If, in respect of the period from and including the sixth day of October, 1939, to the date of notification in the *Gazette* of these regulations," (13th April 1943) " the total amount of daily pay and allowances prescribed by the *Air Force Regulations* as payable to any member to whom these regulations apply . . . was higher than the total amount of daily pay and allowances payable under these regulations, the member shall not be entitled to recover the amount of the difference." And reg. 8 (1) provided : " Subject to these regulations, deferred pay shall be credited to the account of each member in respect of his service on and after the date of his embarkation at the rate specified " in the schedule. . . . (4) " Interest at the prescribed rate shall be credited to the account of a member at the end of the second and each subsequent year of his service after the date of his embarkation on the amount of deferred pay accumulated to his credit at the end of the previous year of that service. Interest credited to a member's deferred pay account shall be considered as part of his accumulated deferred pay and shall bear interest accordingly."

The regulations it will be observed operate retrospectively and deprive the plaintiff of the benefits in respect of deferred pay and interest that he claims in this action and might have recovered under the *Air Force Regulations* in force before the *Air Force* (*War Financial*) *Regulations* were gazetted.

Subject, however, to the provisions of the *Acts Interpretation Act* 1901-1941, which I shall presently consider, the regulations are within the powers conferred upon the Governor-General to make regulations, by the *Air Force Act* 1923-1941, ss. 3 (3), 9 and by s. 7 of the *Air Force Act* 1939 ; the *Defence Act* 1903-1941, Part XI. and the *Acts Interpretation Act* 1901-1941, s. 33 (4). And the powers conferred upon the Governor-General are expressed in such general terms that they may be exercised retrospectively as well as prospectively if the intention to do so is apparent (cf. *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1)).

But it is contended that the *Air Force* (*War Financial*) *Regulations* (regs. 5 (2), 8) are void and of no effect by reason of the provisions of s. 48 (2) of the *Acts Interpretation Act* 1901-1941 which provides that " Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—(*a*) the rights of a person . . . existing at the date of notification, would be affected in a manner prejudicial to that person . . . and where, in any regulations, any provision

(1) (1942) 66 C.L.R., at p. 185.

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is made in contravention of this sub-section, that provision shall be void and of no effect." The *Air Force (War Financial) Regulations* are expressed to take effect from a date before the date of notification (See regs. 2, 5 (2)) and therefore are subject to the limitations imposed by s. 48 (2) of the *Acts Interpretation Act* 1901-1941 (See *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1)). But I doubt whether that Act was rightly applied in the case of *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (2) and whether the decision in that case is not inconsistent with the interpretation given to the section in the *Australian Coal and Shale Employees Federation Case* (1).

The critical question in the present case is whether any rights of the plaintiff existing at the date of the notification of the *Air Force (War Financial) Regulations* on 13th April 1943 were affected in a manner prejudicial to him. Apart from reg. 31 of the *Air Force Regulations* the plaintiff in the action had no rights to deferred pay or interest thereon which could be asserted against the Commonwealth. It is contended, however, that the regulation upon its proper construction entitled him to the moneys which he has claimed in this action, namely, deferred pay and interest at the rate in force before the *Air Force (War Financial) Regulations* were gazetted. But the rights created by reg. 31 are in respect of moneys due; and the moneys due and which can be recovered when a member of the Air Force ceases to be a member, are neither more nor less than the amount provided by the regulations. And the *Air Force (War Financial) Regulations* prescribe the amount of deferred pay and interest thereon to which a member of the Air Force is entitled when he ceases to be a member. Those regulations are definitive of the measure of the plaintiff's rights and they are so expressed that they operate both retrospectively and prospectively.

The result, I fear, works a great injustice to the plaintiff and other airmen in the same position but the Court's function is to construe the regulations as it finds them much as one may regret the policy that dictated them and the injustice done to the plaintiff and others.

The appeal should be allowed, the decision of the Supreme Court set aside, the questions stated answered :—(1) No. (2) No.

And the action should be dismissed but without costs in the Supreme Court.

DIXON J. In the judgments delivered in the Supreme Court the provisions made by and under statute that are material to this case have received a very full examination. The result has been to

(1) (1942) 66 C.L.R. 161. (2) (1945) 71 C.L.R. 545.

reduce the whole matter to the simple question whether reg. 2 (1.) and reg. 5 (2) of the *Air Force (War Financial) Regulations* are valid. The inquiry into the validity of the two sub-regulations is itself reduced to the question whether the retrospective provision contained in them is consistent with s. 48 (2) of the *Acts Interpretation Act* 1901-1941.

It is true there is a passage in the judgment of *Davidson* J. which suggests that he was not satisfied that s. 9 of the *Air Force Act* 1923-1941 or s. 7 of the *Air Force Act* 1939 would, in any case, authorize the sub-regulations. But the matter was not pursued and I think that to say that those sections, apart from the restriction imposed by s. 48 (2) of the *Acts Interpretation Act* do not cover the sub-regulations, would unduly narrow a common form of power to make regulations necessary or convenient for carrying out or giving effect to a statute.

We are concerned with that portion of s. 48 (2) which protects rights existing at the time a regulation is notified. The point in the case is the existence of the rights. The material words of the sub-section are these: "Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect—(*a*) the rights of a person . . . existing at the date of notification would be affected in a manner prejudicial to that person . . . and where in any regulations any provision is made in contravention of this sub-section that provision shall be void and of no effect." Regulation 2 (1) provides that the regulations shall take effect on an antecedent date and the effect is to reduce the aggregate amount of deferred pay which otherwise the plaintiff would have received in respect of the period he had served prior to the actual date of notification.

The effectiveness of this sub-regulation must, therefore, depend on the question whether at that time a right to the deferred pay existed in the plaintiff. Regulation 5 (2) expressly disables a man in the plaintiff's position from recovering the excess over the reduced amount of his pay and is consequential upon reg. 2 (1.). For that reason and also because of the express references to a period of time antecedent to the notification, I think that its effectiveness or validity must depend upon the same question.

I regret to say that I find myself unable to adopt the view that the effect of the *Air Force Regulations* was to give the plaintiff before the termination of his service a right to deferred pay, a right which existed then but could not be enforced until after his period of service terminated. The conditions governing the plaintiff's appointment were such as to entitle him to expect, until the adoption of the

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Air Force (War Financial) Regulations, that he would receive the deferred pay at the rates which had been in force and had been advertised. It is, therefore, with regret that I conclude that in point of law no right arose entitling him to that which he had been encouraged to expect and that consequently a retrospective regulation is effective to disappoint his legitimate expectations.

In stating my reasons I begin with the words " rights . . . existing " in s. 48 (2). These are words susceptible of very great variation and extension of meaning. Most changes in the law affect rights, and regulations made under a statutory power make changes in the law. Clearly, however, it is to rights fixed by events before the regulation is notified that the sub-section refers. Again the word " right " might conceivably be applied to any interest which, to however slight a degree or in whatever aspect, the law recognizes and protects. But I think that it is used in sub-s. (2) of s. 48 in a much more limited and definite sense. It means an acquired or accrued right as specific and definite as those to which s. 50 (*a*) of the *Acts Interpretation Act* refers.

In the next place, in considering the meaning and effect of the *Air Force Regulations* their purpose cannot be neglected, namely to provide rules to govern one of the armed forces of the Crown. The relation to the Crown of members of the armed forces is no new subject; the rules of the common law define it. The regulations are not to be read in disregard of those rules and of the long tradition to which they have contributed. At common law neither commission nor enlistment in the services does or can amount to a contract with the Crown and neither officer nor man obtains any legal right against the Crown to pay, deferred pay, half pay, pension or emolument. " All engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract: " per Lord *Esher* M.R. in *Dunn* v. *The Queen* (1): see *Macdonald* v. *Steele* (2); *Gibson* v. *East India Co.* (3); *R.* v. *Secretary of State for War* (4); *Leaman* v. *The King* (5): *Lucas* v. *Lucas* (6).

Under the *Air Force Regulations* it is the Governor-General who may appoint and promote officers and issue commissions (reg. 45); their appointments are gazetted and promulgated in orders (reg. 58); they hold during pleasure (reg. 72.) By regs. 31 and 32, which are the counterparts of ss. 12 and 13 of the *Defence Act*, provisions are

(1) (1896) 1 Q.B., at p. 122.
(2) (1792) Peake 253 [170 E.R. 140].
(3) (1839) 5 Bing. (N.C.) 262, at pp. 274, 275 [132 E.R. 1105, at p. 1110].
(4) (1891) 2 Q.B. 326, at p. 338.
(5) (1920) 3 K.B. 663.
(6) (1943) P. 68.

made which, in part, vary and, in part, confirm the common law rule. Regulation 31 says that any person who has been a member of the Air Force may, after having ceased to be a member, recover from the Commonwealth in a court of competent jurisdiction any moneys which under his engagement or by agreement with the Commonwealth are due to him. This breaks in upon the common law, but the right of action which it gives is strictly conditioned and arises only on the termination of the member's service. Neither the words " engagement " nor " agreement " implied any legal right flowing from the fact of engaging or agreeing, except that given by the regulation. Regulation 32 is confirmatory of the common law and shows that reg. 31 must be read as a limited exception from the principle that nothing justiciable grew out of the service of officer or man. Regulation 541 then forces home the consequence by an express denial to the members of " vested rights." So much turns upon its terms that the text must be quoted :—" A member or other person, for whom provision is made in these Regulations shall not be recognized as having any vested rights to any rate of pay, deferred pay, allowance, or any other emolument, except as specially provided herein, and such a member or person shall not be entitled to claim the issue of any emolument, whether under these Regulations or as a reserved right, under special conditions which are not herein provided for."

To my mind the purpose of this provision is to ensure that no right to any form of emolument should vest in a member of the Air Force. The words, it is true, are " any rate " of pay &c. and not " amount." But I think the context shows that the reference is to rates for periods served and it is not confined to excluding rights to have existing rates continued so as to apply to future service. *Davidson* J. thought that the word " issue " showed that pay and deferred pay could not be included in the statement that a member or person should not be entitled to claim the *issue* of any emolument, because you do not " issue " them, you " pay " them. But reg. 528 (1.) speaks of pay being " issued." *Jordan* C.J., as I understand him, regarded the words " except as specially provided herein " as placing outside the operation of reg. 541 the provisions of the regulations which state what officers shall be paid. For instance, reg. 646 (4) provides that a member of the Citizen Air Force, while serving under s. 46 of the *Defence Act*, *shall be paid* the rates of active pay and receive the allowances prescribed for a member of the same rank in the Permanent Air Force. The plaintiff fell within this provision. Regulation 548 (1.) stated what the rates for the Permanent Air

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Force should be, but it contains no express corresponding direction that the officer " shall be paid " the rates. His Honour considered that these mandatory words of reg. 646 (4) were peremptory and overrode the common law and created vested rights, though the enjoyment of some of them was postponed and none of them could be enforced by judicial process until the member left the Service.

But, for my part, I cannot see that the words " except as specially provided " are satisfied by such a provision as that stating that a member " shall be paid " certain rates. They are, however, satisfied by the provisions of reg. 31 and that, I should have thought, was the chief regulation they contemplated.

Roper J. did not deal specifically with the meaning of reg. 541. He referred, however, to reg. 549 which requires that deferred pay at the prescribed rates should be credited to the account of the officer annually, but that payment should not be made till his appointment in the Air Force is terminated. His Honour's view was, in effect, that the result of reg. 31 was to place the plaintiff in the position of having " a present right to the future payment of deferred pay and interest although the right could not be enforced by action until the time for payment itself arrived." It may perhaps be added that reg. 31 of the *Air Force* (*War Financial*) *Regulations* provides for payment to the person " entitled to administer the air-force estate of the member," if he dies or becomes insane. So all possible events are covered, and, in aid of the argument it may be said that, except for a change in the regulations, there is no contingency which would mean that deferred pay was never payable.

However even so, I think that, in view both of the common law rule and of reg. 541 the real meaning of the regulations is clear and it is impossible to spell out of them a present accrued right to deferred pay enforceable *de futuro*. It is doing violence to the actual intention.

In my opinion the appeal should be allowed. The order of the Full Court should be discharged and the first and second questions in the special case stated should be answered—No.

McTIERNAN J. In my opinion the questions in this case should be answered in favour of the Commonwealth. I agree with the reasons of the Chief Justice of this Court. The appeal should, in my opinion, be allowed.

WILLIAMS J. This is an appeal by special leave by the defendant from an order of the Full Supreme Court of New South Wales that judgment in the action be entered for the plaintiff for the sum of

£247 7s. 10d. The Supreme Court ordered that judgment should be entered for this sum pursuant to the unanimous answers which it gave to the first two questions asked in the special case stated pursuant to ss. 55 and 57 of the *Common Law Procedure Act* 1899 (N.S.W.). The first question is :—Whether the moneys claimed by the plaintiff in par. 27 of the special case or any part thereof are moneys due and payable by the defendant to the plaintiff under an agreement with the defendant within the meaning of reg. 31 of the *Air Force Regulations* or s. 12 of the *Defence Act* 1903-1941 ? The Supreme Court answered this question in the negative. If it had answered this question in the affirmative the plaintiff presumably would have submitted that judgment should be entered for the plaintiff for the whole sum of £441 5s. 4d. claimed in par. 27 of the special case.

The second question is :—Whether these moneys are moneys due and payable by the defendant to the plaintiff under his engagement in the Royal Australian Air Force ? The Supreme Court answered this question in the affirmative, subject to the prospective operation of the *Air Force* (*War Financial*) *Regulations*, No. 93 of 1943, that is to say, so much of the said moneys as relates to the period of the plaintiff's engagement prior to 13th April 1943 are so due and payable.

As appears from par. 27 of the special case and from these questions and answers, the dispute between the parties relates to the amount of deferred pay to which the plaintiff became entitled whilst he was an officer in the Citizen Air Force.

The facts and relevant provisions of the *Defence Act* 1903-1941, the *Air Force Act* 1923-1941, the *Air Force Regulations*, and the *Air Force* (*War Financial*) *Regulations* are set out in the special case, and in the judgments of the members of the Supreme Court, and I shall not repeat them in any detail.

The plaintiff became an officer in the Citizen Air Force, General Duties Branch, on 16th October 1939. He obtained his commission pursuant to an application made in response to an advertisement inserted by the Air Board in the *Sydney Morning Herald* on 13th September 1939. The advertisement stated that successful applicants would be granted the rank of pilot officer whilst undergoing a training course with pay at £330 and £36 10s. deferred pay per annum ; and that after graduation they would be promoted to flying officer with pay at £421 and £36 10s. deferred pay per annum. The form of application provided by the Air Board, which the plaintiff signed, was accompanied by a document setting out the standard rates of pay and allowances, including particulars of active and

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deferred pay *per diem* for officers holding the ranks of pilot officers, flying officers, and flight lieutenants. One of the particulars stated that deferred pay would be withheld until the completion of an officer's commission when it would be paid plus three and one half per cent interest on yearly balance.

At the date that the plaintiff applied for his commission, the Citizen Air Force had been called out for war service by a proclamation issued by the Governor-General made under the *Defence Act*, and it is common ground that this proclamation had the effect under reg. 646 (4) of the *Air Force Regulations* of causing the plaintiff to become entitled to be paid the same rates of active and deferred pay and to receive the same allowances as those prescribed by those regulations for an officer of similar rank in the Permanent Air Force. The relevant regulations of the *Air Force Regulations* relating to deferred pay for officers of the Permanent Air Force when the plaintiff became an officer were: reg. 528 (1)—Pay shall be issued for each day of service: reg. 548 (1)—The daily rate of deferred pay for an officer of the Permanent Air Force shall be according to his branch and rank as follows:—(then followed particulars of the rates in (*a*) the general duties branch and medical branch, and (*b*) the equipment branch): reg. 549 (1)—Deferred pay at the prescribed rates shall be credited to the account of each officer annually. (3) Except as prescribed, payment of deferred pay shall not be made until an officer's appointment in the Air Force is terminated: reg. 551 (1)—Interest at the rate of three and one half per cent per annum shall be credited annually on 30th June in each year on the amount of accumulated deferred pay standing at the credit of each officer on 30th June of the previous year. (2) Interest added to the deferred pay shall be considered as part of accumulated deferred pay and shall bear interest in like manner. From 16th October 1939 until 13th April 1943, the plaintiff was credited with deferred pay in accordance with these regulations.

The *Air Force (War Financial) Regulations* were notified in the Commonwealth *Gazette* on 13th April 1943, and came into force on that date: *Acts Interpretation Act* 1901-1941, s. 48 (1) (*b*). Regulation 2 (1) of these regulations provides that they shall, except where otherwise prescribed in these regulations, be deemed to have come into operation as on and from 6th October 1939. Regulation 5 (2) provides that if, in respect of the period from and including 6th October 1939, to the date of notification in the *Gazette* of these regulations, the total amount of daily pay and allowances prescribed by the *Air Force Regulations* as payable to any member to whom

these regulations apply . . . was higher than the total amount of daily pay and allowances payable under these regulations, the member shall not be entitled to recover the amount of the difference. Regulation 8 (1) provides that, subject to these regulations, deferred pay shall be credited to the account of each member in respect of his service on and after the date of his embarkation at the rate and in the manner therein specified.

On 12th September 1942 the plaintiff embarked for the Territory of Papua where he served on operational flights against the enemy over the high seas and the Mandated Territory of New Guinea until 24th December 1942, when he was returned to Australia on account of illness. On 10th September 1945 the plaintiff was discharged from the Royal Australian Air Force.

Regulation 31 of the *Air Force Regulations*, which is in similar terms to s. 12 of the *Defence Act*, provides that any person who has been a member may, after having ceased to be a member, recover from the Commonwealth by suit in any court of competent jurisdiction any moneys which under his engagement or by any agreement with the Commonwealth are due to him. Regulation 32 of these regulations provides that the appointment or promotion of an officer under these regulations shall not create a civil contract between the King or the Commonwealth and the officer. Regulation 541 provides that a member or other person for whom provision is made in these regulations shall not be recognized as having any vested rights to any rate of pay, deferred pay, allowance, or any other emolument except as specially provided herein, and such a member or person shall not be entitled to claim the issue of any emolument, whether under these regulations or as a reserved right, under special conditions which are not herein provided for.

The plaintiff contended before the Supreme Court, and has renewed his contention before us, that his application for a commission was an offer by him to serve as an officer in the Citizen Air Force upon the terms and conditions contained in the advertisement of 23rd September 1939 and the document forwarded with the application form, and that when his offer was accepted by the defendant appointing him an officer, an agreement was made within the meaning of reg. 31, between him and the Commonwealth, that he should serve in the Air Force for the duration of the war, and that he should be paid the rates of active and deferred pay, and receive the allowances referred to in the advertisement and document. In my opinion, quite apart from the effect of reg. 32, these facts are not sufficient to create such an agreement. For one thing, the rates of active and

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deferred pay and other allowances set out in the advertisement and document only refer to the rates for the ranks of pilot officer, flying officer and flight lieutenant. The plaintiff was promoted to the rank of temporary squadron leader on 1st December 1943 and retained this rank until he was discharged, so that if his right to pay and allowances depended upon an agreement, there was no express agreement relating to the temporary rank he held after 1st December 1943. The rates are described in the document as standard rates of pay, and were evidently inserted to inform intending applicants of the rates of pay and allowances then payable to junior officers in the Citizen Air Force when called out for war service. No question therefore arises of attempting to reconcile the meaning of agreement in reg. 31 with the provisions of reg. 32. The plaintiff must seek to recover the amount of deferred pay and interest set out in par. 27 as moneys which are due to him under his engagement with the Commonwealth within the meaning of reg. 31.

Apart from statute, the employment of servants by the Crown, naval, military or civil, is at the will of the Crown, so that the Crown is entitled to dismiss them at any time without notice. They are dependent upon the bounty of the Crown for the payment of their remuneration, which does not create a debt, so that they are unable to sue the Crown if the Crown refuses to pay them (*The Commonwealth* v. *Quince* (1)). It was contended that reg. 32 was inserted in the *Air Force Regulations* to give statutory force to this principle of the common law, so that the provisions relating to pay and allowances should be construed, not as giving members of the Air Force a legal right to recover as a debt the pay and allowances prescribed for their respective ranks, but merely as authorizing the responsible officers of the Air Force to make the payments as agents of the Commonwealth and thereby carry out the wishes of the Commonwealth which is under no responsibility to make the payments except by way of bounty. In my opinion it is unnecessary to decide whether in the absence of reg. 31 the regulations would have created any legal debt. Regulation 31 refers to moneys which are due to a member under his engagement with the Commonwealth and to my mind this can only mean that the Commonwealth becomes indebted from time to time to members of the Air Force for the pay and allowances which accrue due to them under the regulations mostly from day to day ; although in the case of an officer the debt in the case of deferred pay only becomes payable when he ceases to be a member, and in the case of any member any debt only becomes enforceable by action when he ceases to be a member.

(1) (1944) 68 C.L.R. 227.

On 13th April 1943, therefore, the date on which the *War Financial Regulations* came into force, the Commonwealth was indebted to the plaintiff for the daily issue of deferred pay and annual interest to which he had become entitled up to that date under the *Air Force Regulations*. This was a rate of deferred pay specially provided for therein so that his right to be paid this amount was a right which had then vested in him within the meaning of reg. 541. As *Roper* J. said in the Court below : " The plaintiff then had a present right to the future payment of the deferred pay and interest although that right could not be enforced by action until the time for payment itself arrived."

As deferred pay only became payable upon embarkation under the *War Financial Regulations*, the effect of reg. 5 (2) was substantially to forfeit the amount of deferred pay which had accrued due to the plaintiff up to 13th April 1943. But the power to give regulations a retrospective operation is subject to the provisions of s. 48 (2) of the *Acts Interpretation Act*. This sub-section provides that :—Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulation so took effect—(*a*) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person ; and (*b*) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification, and where, in any regulations, any provision is made in contravention of this sub-section, that provision shall be void and of no effect. The meaning of this sub-section has been considered by this Court in three recent cases : *Australian Shale & Coal Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1) ; *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (2), and *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (3). In the last-mentioned case (4), I expressed my view, which I shall not repeat, of the meaning of the sub-section construed in the light of the reasons given by the majority of the Court in the *Australian Coal and Shale Employees Federation Case* (1).

Regulation 5 (2) of the *War Financial Regulations* is expressed to take effect in respect of a period from and including 6th October 1939 up to the date of notification and so has a wholly retrospective operation. As the plaintiff on 13th April 1943 had a vested right to the deferred pay which had up till then accrued due under the

(1) (1942) 66 C.L.R. 161.
(2) (1943) 67 C.L.R. 347.
(3) (1945) 71 C.L.R. 545.
(4) (1945) 71 C.L.R., at pp. 586-588.

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Air Force Regulations, the attempt to deprive the plaintiff of this deferred pay by reg. 5 (2) clearly affected this right in a manner prejudicial to the plaintiff so that reg. 5 (2) is void and of no effect against the plaintiff. But this does not invalidate the whole of the *War Financial Regulations*. They are only invalidated *pro tanto*.

For these reasons I agree with the answers of the Supreme Court to the questions in the special case and I would dismiss the appeal.

Appeal allowed. Appellant to pay respondent's costs of appeal. Order of Supreme Court discharged. First and second questions in the case answered—No. Action dismissed.

Solicitor for the appellant, *George A. Watson*, Acting Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Bernard Samuelson & Co.*

J. B.