evidence is that the rent payable under the lease and the purchase money payable if the option of purchase was exercised represented the full rental and sale value of the premises. The real benefit that Parkinson derived from the purchase of the goodwill and from the vendor entering into the restrictive covenant was that he could continue the business of selling bread to the old customers of the Elphin Bakery under that style and without competition from the appellant. The great bulk of the sales to these customers was made in their own homes, so that the real value of the goodwill had nothing to do with any particular site but consisted in the formation of a personal connection with a large number of purchasers of bread who were quite unmindful where the bread was baked, whether at 86 Elphin Road or elsewhere, so long as bread of the same quality continued to be delivered to them by the Elphin Bakery at their own homes. As the appellant said in his evidence, the sales in the shop were negligible and the only reason for the business being carried on at all was the bread round. The formation of that connection by the appellant must have been assisted by the exclusive licence which he had held since 1942 to sell bread in the zone area, and the transfer of that licence to Parkinson made it almost certain that he would be able to hold that connection and consolidate his position, for it would be inconvenient for an inhabitant of the area to have to purchase his bread elsewhere. This temporary advantage may have added something to the value of the goodwill. But there is no reason to suppose that the real consideration for the payment of the £1,750 was not what it purported to be, namely, the added value that the business would derive from the absence of competition by the appellant. Goodwill can only be said to be connected with land, however wide the meaning of the words " connected with " in s. 83, if the site forms a real element in the value of the business, so that the land has an added value because the purchaser of the business must purchase the land or obtain a lease and continue to carry on the business there, at least for a time, if he is to retain the real value of what he has bought.

The covenant in the lease to keep the premises open as a shop does not throw any light upon the question whether the goodwill was attached to or connected with 86 Elphin Road or not. No doubt the appellant contemplated that, if Parkinson did not exercise his option of purchase, the premises would revert to him at the end of the lease and that his restrictive covenant would then cease, so that he could, if he wished, recommence the business of a baker or relet or sell the premises to a lessee or purchaser

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desirous of doing so. It was therefore an advantage that the shop and bakehouse should be retained and there was a chance that a valuable goodwill might become attached to the premises because, owing to changes in the neighbourhood or as a result of the manner in which Parkinson carried on the business, a considerable number of the public had become accustomed to purchase their bread at the shop. But the fact that the appellant hoped to obtain these advantages at the conclusion of the lease could not throw any light upon the question whether the goodwill of the business was attached to or connected with the premises at the date of the contract.

It is to be observed that the payment in question in this case was not consideration "for" any goodwill; it could not fall within the definition of premium unless it were consideration "in connexion with" goodwill attached to or connected with the land leased. The case was argued on the assumption that the goodwill to be considered in such a case is the entire goodwill enjoyed in the carrying on of the business existing on the land, and therefore includes any goodwill which the land itself may be said to possess by reason of its natural or accrued suitability for that kind of business. We have discussed the case on that footing, and the conclusion we have reached makes it unnecessary to consider whether any payment which in truth is given for nothing more than a personal covenant against an individual engaging in a competing business could in any case be held to be consideration in connection with goodwill attached to or connected with land.

For these reasons the appeal should be allowed with costs and the respondent ordered to reduce the assessment under appeal by excluding the sum of £1,750 from the assessable income of the appellant derived during the year ended 30th June 1946.

TAYLOR J. The question in this case is whether the sum of £1,750 which was received by the appellant in the income year ended 30th June, 1946, was a premium within the meaning of s. 83 of the *Income Tax Assessment Act* 1936-1946 and, therefore, part of his assessable income for that year pursuant to s. 84.

It was contended on behalf of the respondent that the sum in question fell fairly within the third limb of the definition of "premium" as being consideration payable in connection with goodwill attached to or connected with land, a lease of which was granted by the appellant to the purchaser of his business. The appellant, on the other hand, argued firstly, that this sum did not become payable "for or in connexion" with any goodwill, and

secondly, that even if it did, the goodwill was not "attached to or connected" with the land, a lease of which was granted.

I agree entirely with the conclusion contained in the joint judgment that "Goodwill can only be said to be connected with land . . . if the site forms a real element in the value of the business, so that the land has an added value because the purchaser of the business must purchase the land or obtain a lease and continue to carry on the business there, at least for a time, if he is to retain the real value of what he has bought". Applying the test which is implicit in this statement it is, in my opinion, quite clear that there was no evidence before the Board of Review that the goodwill of the appellant's business was, in the sense in which the expression is used in s. 83, attached to or connected with the subject land.

I have stated my view on this point independently, because I am not, as at present advised, prepared to reject the first of the appellant's submissions. There is, I think, a great deal of force in the submission that, even if the goodwill of the business was in part connected with the subject land, the consideration for the appellant's covenant against competition was not consideration payable "for or in connexion with any goodwill . . . attached to or connected with" the subject land. It was not suggested at any time during argument that the written agreement did not represent the real agreement between the parties or that the consideration provided thereby for the covenant against competition was not bona fide attributable to the giving of the covenant. This being so, I think it is open to argument that the sum in question was not consideration payable "*in connexion with*" the goodwill of the business nor in connection with *any goodwill attached to or connected with the land* and I wish to reserve my views on these points.

I agree that the appeal should be allowed and with the form of order proposed.

Appeal allowed with costs. Order respondent to reduce the assessment under appeal by excluding the sum of £1,750 *from the assessable income of the appellant derived during the year ended* 30*th June* 1946.

Solicitors for the appellant, *Archer Hall, Waterhouse & Campbell*, Launceston, by *Hedderwick, Fookes & Alston*.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

CONSTABLE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION } RESPONDENT.

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SYDNEY, *Aug.* 19, 20; *Dec.* 11.

Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ.

Taxation—Income tax—Assessable income—Provident fund—Contributions by employers and employees—Moneys payable thereout upon happening of event—Contingency becomes absolute—Moneys paid to employee—"Allowance, gratuity, compensation, benefit, bonus or pension" in respect of employee's employment "allowed, given or granted to him"—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *ss.* 19, 26 (*d*), (*e*).

The regulations of a provident fund into which each employee-member paid ten per cent of his salary and each employer-member paid a like amount, contained a regulation empowering the administrators, with the consent of the founding companies, to alter the regulations by notarial act, and if in consequence of the alteration the right of the members be curtailed or their obligations increased, then any member was entitled to withdraw the amounts as shown in his account by giving notice within a specified time. An alteration in the regulations was made putting an end to the admission of new members and terminating the obligation of the companies and of the members to continue making contributions. An employee-member regarded this as curtailing his rights and he duly notified his exercise of his right to withdraw the amounts shown by his account. The Commissioner of Taxation included in the employee's assessable income so much of the sum withdrawn as corresponded with the contributions made in respect of the employee by his company and interest thereon and with the interest on the moneys ascribed to the contributions made by the employee, but he did not include any amount representing the employee's own contribution as a member.

Held that the employee became entitled to the payment by reason of a contingency which upon the happening of an event in the year of income became absolute; that event was not an "allowance, gratuity, compensation, benefit, bonus or premium allowed, given or granted" to the employee "in respect of, or for or in relation" to his employment within the meaning of s. 26 (*e*) of the *Income Tax Assessment Act* 1936-1947, therefore no part of that payment formed part of his assessable income.

CASE STATED.

Upon an appeal by Albert Ernest Constable from an assessment by the Commissioner of Taxation under the *Income Tax Assessment Act* 1936-1947 for the income year ended 30th June 1948, *Williams* J. stated for the opinion of the Full Court of the High Court a case which was substantially as follows:

1. The appellant Albert Ernest Constable is now and has since 22nd June 1936, been employed as an ironworker's assistant by the Shell Co. of Australia Ltd. a company duly incorporated in England and registered as a foreign company in New South Wales.

2. On 22nd June 1936 he became a member of Het Voorzienings-fonds der Verbonden Petroleum Maatschappyen (Provident Fund of the Combined Petroleum Companies). The regulations of that fund, as amended, were set out in the schedule thereto. The Shell Co. of Australia Ltd. was a member of that fund. (Those regulations, or articles, are, so far as material, set forth hereunder and in the judgments below.)

3. Following upon the inclusion of art. 26 in those regulations the appellant exercised his right under art. 23 (3) to withdraw from the fund as at 30th September 1947, and on 12th March 1948, the sum of £403 1s. 9d. was paid to him from the fund and the receipt given by him for that sum was in the words and figures following:—

" Mr. Albert Ernest Constable
New South Wales.
Joined Staff 22/6/36. Withdrawn from Fund.
Nationality—British 30/9/47.
Country of Residence—Australia.

		Contributions		
1945		Member's	Company's	
Dec. 31	By Balance per London Statement	£140 0 11	£182 8 6	
			£140 0 11	
			£322 9 5	

Australian Equivalent $\frac{125}{100}$ £403 . 1 . 9

Exchange £80 . 12 . 4.

(FRS. SDH. 25/2/48)

Received from the Provident Fund of the Combined Petroleum Companies (Curacao) the sum of £322 9s. 5d. in full satisfaction and

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discharge of my claims upon the fund, with the exception of contributions for 1946 and 1947, and interest for 1946 and interest, if any, for 1947 and 1948.

Signature.....

Date....."

4. In a statement dated December 1946 supplied by the fund to the appellant showing the credit in the appellant's account with the fund on 31st December 1945, the following figures appear:

Company's Contribution	£171	13	10
Interest	10	14	8
	£182	8	6
Member's Contribution..	£131	11	3
Interest	8	9	8
	£140	0	11

These amounts are quoted in British currency.

5. On 3rd June 1948, the appellant signed a receipt for £145 6s. 7d. in the words and figures following:—

"Mr. Albert Ernest Constable
New South Wales.

Joined Staff 22/6/36. Withdrawn from Fund 30/9/47.
Nationality—British
Country of residence Australia.

	Contributions					
1946	Member's			Company's		
Dec. 31 by contributions for 1946	11	11	0	23	2	0
Dec. 31 by interest @ 6.75%	9	16	10	13	1	11
1947						
Sept. 25 by contributions for 1947 ..	12	16	8	19	1	8
Dec. 31 by interest @ 6.7%	11	6	1	15	9	1
	45	10	7	70	14	8
				45	10	7
				£116	5	3

Australian Equivalent $\frac{125}{100}$ £145/6/7

Exchange £29/1/4

(GM/MEH, 28/5/48)

Received from the Provident Fund of Combined Petroleum Companies (Curacao) the sum of £116 5s. 3d. Sterling in full satisfaction and discharge of my claims upon the Fund, with the exception of interest that may be declared for 1948.

Signature.....(Sgd.) A. E. Constable.

Date.....3/6/48."

A cheque for the said sum of £145 6s. 7d. was drawn by the Shell Co. of Australia Ltd. on its bank which cheque bears date 18th June 1948, and was forwarded by the Sydney office of that company to its refinery at Clyde where the appellant was employed on 25th June 1948, and was handed to the appellant on or about 3rd July 1948, and was deposited by him to the credit of his bank account on 9th July 1948 and was presented for payment to the bank of the company on 12th July 1948.

6. The following amounts excluding the appellant's own contributions were credited to his account in the fund during the twelve months ended 30th June 1948 namely,

Employer's Contributions	£19	1	8
Interest	15	9	1
Interest on Appellant's Contributions ..	11	6	1
	£45	16	10

This sum is British currency the Australian equivalent is £57 6s. 0d.

7. The company's contributions with interest thereon as set out in par. 3 of the case stated, namely, £182 8s. 6d. British currency represent £228 0s. 8d. Australian currency and the amount of £70 14s. 8d. British currency set out in par. 5 represents £88 8s. 4d. Australian currency. These two sums make a total sum of £316 9s. 0d. Australian currency.

8. The interest earned by the member's contributions over the years amounted to £48 3s. 0d. Australian currency and the portion of such interest referred to in par. 5, namely, £9 16s. 10d. and £11 6s. 1d. amounted to £21 2s. 11d. British currency which is equivalent to £26 8s. 3d. Australian currency.

9. The appellant lodged with the respondent an income tax return for the year ended 30th June 1948, which showed the following items :—

"I. Wages as employee of Shell Oil Co. of Australia Limited	£ 348
5. Five per centum on Retiring Allowance Gratuity of Compensation received in lump sum (total amount	

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		£
received £404) (Give Details) Provident Fund including own and Co.'s donations		20
	Total income	£368
Deductions.		
7. Subscriptions to Ironworkers Union		2
Nett income from personal Exertion		£366 "

10. The appellant also made a claim for concessional allowances in respect of his wife and two children and for £2 0s. 0d. for medicines purchased from a chemist.

The appellant also claimed the following items as allowances :—

" *Life Assurance* premium paid and payments made to a Friendly Society Superannuation Fund, Sustentation, or similar Fund :—		
Name of Company, Society or Fund :		
Shell Co. of Australia Ltd.	£8 0 0	
A.M.P.	5 0 0	
Lodge	6 0 0	
		£19 0 0
Rates or Land Taxes for which the taxpayer is personally liable paid on properties from which no income is derived, not including amounts paid for excess water		7 0 0"

11. The respondent issued to the appellant an assessment dated 22nd June 1950, based on the income derived during the year ended 30th June 1948, the material portions of which assessment are as follows :—

" Taxable Income & Rate Contributions Income	(pence in £)	Gross Tax & Gross Contribution	Less Rebates	Nett Tax & Nett Contributions.
Personal Exertion £662	25.7341			
Property 48	36.9313	78 7 0	59 15 0	18 12 0
Social Services ..	18.			53 5 0
	Total Amount Assessed			71 17 0
	Instalment Deductions credited			5 12 9
	AMOUNT PAYABLE			£66 4 3"

12. Together with the issue of that assessment the respondent forwarded an adjustment sheet in the words and figures following:—

"Federal Income Tax and Social Services Contribution Adjustment Sheet.

Name: Albert E. Constable. File No. K52054

The following adjustments have been made in the figure of the return lodged by you in respect of income derived during the year ended 30/6/48.

Nett Income as returned. Your Assessment has been based on the following:	Income from Personal Exertion		Income from Property	
	Amount £	Total £	Amount £	Total £
1. Salary/Wages		348		
2. Amount withdrawn from Provident Fund representing Company's contributions and interest thereon..		316		
		664		
Less Union		2		
		662		
3. Amount withdrawn from Provident Fund representing interest on contributions paid to Fund by you..				48
2 & 3 above as per advice from Shell Co. of Aust. Taxable Contributions Income as shown in attached Notice 710		662		48"

13. On 26th June 1950 the appellant lodged with the respondent a notice of objection, omitting formal parts, in the words and figures following:—

"Dear Sir,

Re Albert E. Constable—File No. K.52054.
Income Tax. 1948: Asst. No. 34622.

I object to the assessment for the year ended 30th June 1948 herein in which there is added to the taxable income and contributable income amounts totalling £364, stated in the adjustment sheet as representing amounts withdrawn from a Provident Fund

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being the Company's contributions plus interest thereon (£316) and also interest on contributions paid into the Fund (£48).

Grounds for objection are that the amounts allegedly so paid or withdrawn from the said Provident Fund (the Provident Fund of the Combined Petroleum Companies Curacao) are not in the nature of assessable income within the meaning of the Income Tax Act; or alternatively only portion of such amounts withdrawn are assessable income but no greater amount than the total of the amounts actually contributed by my employer Company during the year of income ended 30th June 1948, and the amount of interest derived from the invested or accumulated money standing to my credit in the said Fund during the said year of income.

In this latter respect, I refer you to reasons advanced in the matter of Ernie Charlton, File No. E79849 dated 2nd May 1949.

Yours faithfully,

(Sgd.) A. E. Constable."

14. By a notice dated 20th December 1950, the Deputy Commissioner of Taxation informed the appellant that he had disallowed the appellant's objection.

15. By a request dated 27th December 1950, the appellant requested the respondent to treat the objection as an appeal to the High Court pursuant to s. 187 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950.

The questions submitted for the consideration of the Full Court were:—

(a) Whether the said sum of £316 or any portion thereof formed part of the assessable income of the appellant in respect of the year ended 30th June 1948.

(b) Whether the said sum of £48 or any portion thereof formed part of the assessable income of the appellant in respect of the year ended 30th June 1948.

The regulations of the fund referred to in par. 2 of the case stated showed that the fund was established by a deed executed at The Hague, Holland, on 17th October 1912, and amended by deed executed at The Hague on 30th April 1932. Article 26, which was added in 1947 provided (1) that no person should on or after 1st October 1947 be admitted as a member of the fund under art. 6 (3) or otherwise; (2) that no person should be obliged under art. 7 (1) or otherwise to make any payment into the fund in respect of any salary due to him for any period after 30th September 1947, and the omission of any member to make any such payment should not be deemed to be a failure within the meaning of art. 21 (1); (3) that no company should be obliged under art. 8 (1) or art. 19 (2)

or otherwise to make any payment into the fund in respect of any period after 30th September 1947; and (4) that the provisions of art. 26 should have effect notwithstanding anything to the contrary in any other article.

Employees of companies which had joined the fund were, on expressing their desire in writing so to do and on the recommendation of the employer-company, admitted as members of the fund in accordance with the provisions of the articles (art. 6 (3)). No member had any right to the amount standing to his credit in the fund except in accordance with the fund's regulations (art. 24).

R. J. M. Newton, for the appellant. This matter, which involves a consideration of s. 26 (*e*) of the *Income Tax Assessment Act* 1936-1947, has been the subject of conflicting decisions of the Board of Review: see *Commonwealth Board of Review Decisions* (N.S.), vol. 1, p. 284, Case 69; p. 435, Case 101. Under art. 8 (3) the company was not required to contribute more than ten per cent including any amount it was required to contribute to any other pension or savings or superannuation scheme as referred to in the preceding part of the article. The significance of art. 8 (4) is that the money received from the companies from time to time by the board is received into its fund and is in the discretion of the board of administrators. It is not credited to the employee's account immediately. In fact the whole or part of it may never be credited to the employee's account. The effect of art. 16 (1)-(3) is that if a member leaves the fund in such circumstances that he is not entitled to the whole of the contributions that have been paid in respect of him, then that money shall form part of the fund, and it is conceivable that a member of the fund might be entitled to benefit from those moneys which had been paid in in respect of other employees. The company's contributions and interest are sought to be taxed at the personal exertion rate, and the interest from the employee's own contributions is at the property rate. Neither the said sum of £316 nor the said sum of £48, nor any portion thereof, are taxable under s. 26 (*d*) of the Act. Alternatively, if the money involved is taxable then it is only taxable to the extent and at the time that it is so credited to the account of the employee in the fund. Further, it is a capital amount; a lump sum paid in consequence of retirement from or termination of any office of employment. The termination of employment does not relate to the time of payment but to the nature of the payment itself. The fund was created to provide a fund for a retiring allowance. At some time this employee will retire or will cease

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to be employed. The payment of the money has only been accelerated by virtue of the amendment to the deed in 1947, but the nature of the payment has not been changed. A retiring allowance need not be paid at the point of time when the employment is terminated. The commissioner cannot succeed in this case because the money was not granted to the taxpayer or given to him indirectly in relation to any employment for services rendered by him, within the meaning of s. 26 (*e*). It must be something in the nature of a recurring payment, not necessarily an annual payment, but something that is associated with his employment over the years. The money was not paid to the taxpayer directly. It is obviously a payment that will not recur. It is a winding-up of a fund. If that fund had continued until his retirement it would not have been taxable. It is not suggested that s. 26 (*e*) could be circumvented by the interposition of a third party. The specific things mentioned in s. 26 (*e*) give some indication of the types of payments that section contemplates. This scheme is very similar to an insurance policy taken out by an employee and contributed to by the employer. If such a policy were surrendered prior to its maturity, or to the time when the taxpayer would become entitled to it, and he still remained an employee of that employer, the money would not be taxable. Articles 2 and 6 (3) show that there is not any right to join the fund. There is not any contract between employer and employee to join the fund; it is purely a matter of discretion and could be restricted to any class of employee. The payment is a capital sum. It is not income under s. 25 because it is not recurring. Article 7 (4) is significant. In view of arts. 16 (1) and 20 (2) it cannot be said that the moneys paid by the employer into the fund from time to time can be regarded as something paid in respect of the taxpayer's employment or services rendered by him. The taxpayer became entitled to it by virtue of his status as an employee of the employer, and not as a result of any services or employment. Under art. 24 the taxpayer had no claim to any moneys in the fund except in pursuance of the regulations. The resolution of 1947 did not in any way change the nature of the fund or of the moneys in that fund; all it did was to bring the fund to an end and to create a set of circumstances. Alternatively, if the Court should be of opinion that the money is taxable under s. 26 (*e*) then it is only taxable to the amount of the sums credited to the employee's account during the year of tax. The procedure in art. 12 has little relationship, or may have little relationship, to the amount that is contributed by the employer in each year, and there is not any right; it is not associated with

the employee's service during the year. The Board of Administrators can, under art. 2, fix the conditions under which a company may join a fund, and may, in fixing those conditions, fix the payments the company shall make to the fund: see art. 6. If any amount is taxable at all, it is the amount that is credited to the taxpayer's account during the year of income, that is, the amount shown in par. 6 of the case. The amount that was paid in 1948 was paid by the Provident Fund and not by the Shell Co. of Australia: see pars. 3 and 5. That was the amount that was received as a benefit, if it is taxable, in 1948, and that included an amount which had been contributed to that fund by the taxpayer himself and, presumably, on which he had been taxed. So he was receiving back in 1948 some of the money that he had already paid and certain other moneys. There was not any justification for splitting up that sum paid to him in 1948. It was either all taxable or not taxable at that stage. Upon a contribution being paid by the company to the fund it forms part of the composite funds of the provident fund and loses its identity as such. It then becomes a credit in the taxpayer's account in the fund and that was the sum paid to him in 1948. There was not any benefit in 1948 passing from the company to the taxpayer: it was something that accrued to the taxpayer at an earlier stage: see s. 19 of the Act. The use of the word "accumulated" has some particular significance. The meaning of "derived" was considered in *Harding* v. *Federal Commissioner of Taxation* (1). That word means "accruing" or "arising" and, applied to the facts of this case, if any benefit did arise or was derived or was granted, it arose or accrued to the taxpayer at the time it was credited to his account in the fund.

[WILLIAMS J. referred to *Gair* v. *Federal Commissioner of Taxation* (2)].

This is not income under s. 25 and is not caught by s. 26 (*e*). As to the cheque after 30th June 1948, see *Ashby* v. *Hayden* (3).

W. J. V. Windeyer Q.C. (with him *J. D. Evans*), for the respondent. The employer's contributions and the interest thereon are part of the taxable income properly taxed in the year in which they were received by the taxpayer from the fund. The interest on the employee's contribution was income from property. The employer's contributions and the interest thereon are within the words of s. 26 (*e*) of the *Income Tax Assessment Act* 1936-1947, and have been treated as being part of the emoluments of the service, and

(1) (1917) 23 C.L.R. 119, at p. 131.
(2) (1944) 71 C.L.R. 388.
(3) (1931) 31 S.R. (N.S.W.) 324; 46 W.N. 61.

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therefore as income from personal exertion. The Dutch deed is a transaction by which moneys provided by the employer are invested on behalf of employees and carried to separate accounts in the names of individual employees. The shares of individual employees in the fund are such that they have a beneficial interest payable on retirement or earlier death or by operation of art. 23. The payments made by the employer and treated in that fashion provide on retirement, death or the operation of art. 23 a value to the taxpayer which is described by one or more of the words appearing in s. 26 (*e*). It is either a benefit, bonus or gratuity or allowance. Any discretion had by the administrators of the fund must be limited by art. 2. Special reference should be made to arts. 2, 8 (4), 10, 11, 14, 15, 18, 19, 23 and 26. The circumstances in which art. 19 operates are an indication that the contributions made to the fund by the employer is part of the emoluments of the employee's service because once the fund has reached the specified amount the employer discontinues making contributions to the fund and makes them to the employee. The definitions on the Act of "income from personal exertion" and "income from property" are mutually exclusive, and whether or not they be collectively exhaustive of the whole field of income they both form part of the gross income. Anything which falls within the description of income from personal exertion becomes, if it be not exempt, taxable under s. 25. Section 26 (*e*) clearly catches the sum constituted by the employer's contribution and the interest thereon. Sub-section (*d*) of s. 26 is an exception from sub-s. (*e*). If those sums do not come within sub-s. (*d*) only because they were paid prior to retirement then they must be within sub-s. (*e*). Everything which falls within sub-s. (*d*) would fall within sub-s. (*e*) but for the proviso to sub-s. (*e*). The fact that the contributions and interest are credited to an account opened in the name of the employee gives the employee a right, upon the conditions provided by the deed, to the amounts standing to the credit of that account upon death or retirement. At various stages money becomes credited to the account of the individual employee. The employee gets a proprietary interest, as a result of the deed, as soon as the money is credited. The money is paid by the administrators out of a fund, but it is not necessary for the purpose of s. 26 (*e*), or for income tax purposes generally, that money which is received in reference to employment, should be paid by the employer.

[FULLAGAR J. referred to *Inland Revenue Commissioners* v. *Burrell* (1) and *Federal Commissioner of Taxation* v. *Blakely* (2)].

(1) (1924) 2 K.B. 52.

(2) (1951) 82 C.L.R. 388.

What is made income is not the amount which is distributed but the value to the taxpayer of those gratuities which were allowed, given or granted to him indirectly in respect of or in relation to his employment. Section 26 (*e*) deals expressly with gratuities. It is immaterial for the purposes of s. 26 (*e*) whether the payer is the employer or somebody else. If it be correct to describe the transaction as " discretionary " and " voluntary " it does not make any difference because a mere gratuity is caught: see *Herbert* v. *McQuade* (1) and *Chibbert* v. *Joseph Robinson & Sons* (2). *Commissioner of Income Tax of Madras* v. *Fletcher* (3) is a case under a different fund and a different statute and throws little light upon the application of s. 26 (*e*) and is no guidance to the proper decision in this case. *Smyth* v. *Stretton* (4) was distinguished in *Edwards* v. *Roberts* (5). Income or money received should be attributed to the year in which it is actually received by the taxpayer (*Edwards* v. *Roberts* (5), *Commissioner of Taxes* (*S.A.*) v. *Executor Trustee and Agency Co. of South Australia Ltd.* (6), *Gair* v. *Federal Commissioner of Taxation* (7), *Ballarat Brewing Co. Ltd.* v. *Federal Commissioner of Taxation* (8), *Permanent Trustee Co. of New South Wales Ltd.* v. *Federal Commissioner of Taxation* (9)). The money came to the taxpayer in reference to the employment and it could not have been recovered at any earlier date. The real nature of the interest on the employee's contributions is that it is interest earned by the employee's moneys which he has handed to the fund for investment. In all relevant documents the moneys were described as contributions and interest thereon. The interest is separated from the contributions. The interest upon the contributions of the employer is absorbed in the phrase " the value to the taxpayer of the employer's contributions ". The interest remains interest although it may be capitalized or compounded. It never loses its character as interest (*Inland Revenue Commissioners* v. *Oswald* (10), *In re Morris*; *Mayhew* v. *Halton* (11)).

R. J. M. Newton, in reply. The Board of Administrators invest the moneys of the Provident Fund. Once the member's contribution and the company's contribution goes into that fund it forms part of the general fund. Interest credited to that fund is not interest on the taxpayer's money but such proportion of the interest

(1) (1902) 2 K.B. 631.
(2) (1924) 9 T.C. 60.
(3) (1937) 64 Ind. App. 323.
(4) (1904) 5 T.C. 36.
(5) (1934) 19 T.C. 618.
(6) (1938) 63 C.L.R. 108, at pp. 154, 155.
(7) (1944) 71 C.L.R. 388.
(8) (1951) 82 C.L.R. 364, at pp. 368, 369.
(9) (1940) 6 A.T.D. 5.
(10) (1945) 1 All E.R. 641.
(11) (1922) 1 Ch. 126, at pp. 131-135.

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earned or the profits of the whole fund as he may be entitled to on a distribution. Although the payments to the fund by the company may have relationship to the employment and to the services rendered by the employee at the time they are paid into the fund, they lose their character as such and at the time that the money is paid to the taxpayer it is a different sum altogether which has no relationship to the employment or services rendered.

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, WILLIAMS AND FULLAGAR JJ. This is a case stated upon an appeal by a taxpayer from an assessment by the Commissioner of Taxation under the *Income Tax Assessment Act* 1936-1947. The year of income under assessment is that ended 30th June 1948. During that year the taxpayer received the sum of £403 1s. 9d. on account of his interest in a fund called the Provident Fund of the Combined Petroleum Companies and the question to be decided is whether any portion of this sum forms part of the taxpayer's assessable income. It is in fact a payment in pounds Australian of a somewhat larger sum calculated in sterling to which the taxpayer was entitled, but the rest of the sum was paid in the following year of income.

The money represented the total amount payable to the taxpayer under the regulations of the fund. It became payable under the regulations because of a clause entitling members to withdraw the amounts standing to the credit of their accounts if an alteration were made to the regulations curtailing the rights of members. An alteration of that nature was in fact made taking effect as from 30th September 1947. The fund was established by a deed executed at The Hague and is governed by the regulations already referred to. They are divided into articles, the second of which states that the object of the fund is to accumulate for the benefit of the companies' employees who have joined the fund certain sums as a provision for themselves and their families. The taxpayer has been for many years employed as an ironworker's assistant by one of such companies, namely the Shell Co. of Australia Ltd. He became a member of the fund on entering that company's service.

As the payment in question was not made in consequence of retirement from or termination of his office or employment, it was not possible to treat it as the capital amount of any allowance, gratuity or compensation, paid as a lump sum on such an event

within the meaning of s. 26 (*d*) of the *Income Tax Assessment Act*, which includes only five per cent of such a capital amount in the assessable income. The Commissioner of Taxation accordingly brought the whole amount into the assessable income of the taxpayer, claiming that it fell within s. 26 (*e*).

Section 26 (*e*) provides that the assessable income of a taxpayer shall include the value to him of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him, whether so allowed, given or granted in money, goods, land, meals, sustenance, the use of premises or quarters or otherwise. There is a proviso by which the paragraph is not to apply to any allowance, gratuity or compensation which is included in par. (*d*) of s. 26 or which under any provision of the Act is deemed to be a dividend paid to the recipient. The proviso does not appear to have any importance in the present case. The actual payment cannot, for the reason already given, fall under s. 26 (*d*), and it certainly is not deemed to be a dividend paid to the recipient. Whatever light the proviso may throw on the meaning of s. 26 (*e*) in other respects, it does not illuminate any of the questions arising here.

Upon the text of the paragraph it would seem that the liability of the sum, or any part of the sum, received by the present taxpayer during the year of income to inclusion in his assessable income must depend upon the answers to one or other or all of the following questions. Can that sum or any part of it be described as an allowance, gratuity, compensation, benefit, bonus or premium? If so, can it be said of it that it was "allowed, given, or granted to him" during that year? If an affirmative answer is given to these two questions, then is it correct to say of the amount or any part of it that it was so allowed, given or granted to him "in respect of, or for or in relation directly or indirectly, to any employment of him or services rendered by him?" The employment or services must be employment by, or services rendered to, the Shell Co. of Australia Ltd. It is evident that it is enough for the taxpayer if any of the foregoing questions is answered in the negative.

For an understanding of the manner in which the facts of the case bear upon these questions it is necessary to turn to the regulations controlling the rights of members in the fund. The regulations, the original of which is in Dutch, speak of the fund as if it had legal personality. The first article describes it as domiciled at The Hague. Whatever we may suspect, there is nothing before us to

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show it is a *persona ficta*. It is governed by a Board of Administrators appointed by three companies which founded it. With their consent other companies may join and no doubt that is how the Shell Co. of Australia Ltd. came to belong to it. The fifth article says that the assets of the fund shall consist of (a) the foundation moneys paid by the founding companies, (b) the contributions of employees of the companies who have joined the fund and of these companies themselves, (c) the interest and other revenues. Other articles provide that employees of each company which has joined the fund may be admitted as members and each such member shall pay into the fund ten per centum of his salary, a requirement subject to variation in certain contingencies which are not material. The company on its side must pay to the fund ten per centum of the employee's salary, or such other amount as is equal to the employee's contribution. It is open to the company to pay " into the credit of its own employees " a greater percentage of the salary or a share of its profits (art. 10 (1)). In the first instance an employer's contributions are credited (" booked ") to a special account. Then at the close of the year the administrators of the fund decide, having regard to the assets and liabilities of the fund, what amount shall be transferred from the special account to the credit of the members' accounts (art. 8 (4)). Any balance goes to a suspense account pending transfer to the members' accounts. The moneys of the fund are to be invested and the interest and profits credited to an " interest account ", to which losses are to be debited. The balance, after making any special reserves the administrators may think desirable, is to be distributed among the members', (that is the employees') accounts, the suspense account and the reserve account in proportion to their respective amounts (art. 12).

For every such member there is to be kept a separate account, and to it are to be credited the total amounts paid by him and by the company employing him as an additional percentage of his salary or as a percentage of profits, and also the amounts transferred from the special account (art. 11). These are the accounts referred to as the members' or participants' accounts. A member is entitled to an annual statement showing the position of his account, but, as long as he remains in the service of his company, he has no claim whatever to a " refund " (which must mean any payment out) of the amounts standing to his credit or of any part thereof (arts. 13 and 14). But the amount standing to his credit shall be paid out to him within six months of his retirement from that service, subject to certain exceptions or qualifications which may be disregarded (art. 15). If he dies while in the company's service,

the amount shall be paid to those entitled to his estate (art. 18). The member's rights to the amounts due to him by the fund in accordance with the regulations are to be personal and therefore inalienable (" cannot be ceded or pledged "). A member infringing this provision may at the discretion of the administrators forfeit the benefit of the company's contributions but not of his own (art. 20). Failure of a member to keep up his own contribution to the fund exposes him to exclusion from membership and forfeiture of the benefit of the company's contribution, but again not of his own (art. 21). In all matters the decision of the administrators is final (art. 25).

The payment to the taxpayer part of which the commissioner has included in his assessable income arose, as has already been stated, from an alteration in the regulations. By art. 23 a power is conferred upon the administrators, with the consent of the founding companies, to alter the regulations by notarial act. Notice in writing of such an alteration must be given to every member. If in consequence of the alteration the right of the members be curtailed or their obligations increased, then any member shall be entitled to withdraw the amounts as shown in his account by giving notice within three months after he receives notice of the alteration. An alteration in the regulations was made putting an end to the admission of new members and terminating the obligation of the companies and of the members to continue making contributions. This was regarded as curtailing the rights of existing members and the taxpayer duly notified his exercise of his right to withdraw the amounts shown by his account.

The Commissioner of Taxation included in the assessable income so much of the sum withdrawn as corresponded with the contributions made in respect of the taxpayer by his company and interest thereon and with the interest on the moneys ascribed to the contributions made by the taxpayer. He did not include in the assessable income any amount representing the taxpayer's own contribution as a member. By a misunderstanding part of the amount was included which was paid in the next year of income as the balance to which the taxpayer was entitled from the fund; but it is conceded that this must be excluded from the present assessment, and accordingly we are not concerned with it.

On these facts we are of opinion that, whether or not the payment or any part of it may be described as an allowance, gratuity, compensation, benefit, bonus or premium in respect of or for or in relation to the taxpayer's employment or services rendered by him, it cannot correctly be said that it was such an allowance, &c.

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" allowed given or granted to him " during the year of income under assessment.

It appears to us that the taxpayer became entitled to a payment out of the fund by reason of a contingency (viz.: an alteration of the regulations curtailing the rights of members) which occurred in that year enabling him to call for the amount shown by his account. It was a contingent right that became absolute. The happening of the event which made it absolute did not, and could not, amount to an allowing giving or granting to him of any allowance, gratuity, compensation, benefit, bonus or premium. The fund existed as one to a share in which he had a contractual, if not a proprietary, title. His title was future, and indeed contingent or, at all events, conditional. All that occurred in the year of income with respect to the sum in question was that the future and contingent or conditional right became a right to present payment and payment was made accordingly. This, in our opinion, cannot bring the amount or any part of it within s. 26 (*e*). The amount received by the taxpayer from the fund is a capital sum, and, unless it or some part of it falls under s. 26 (*e*) (there being no other applicable imposition of liability), it is not part of the assessable income.

While we prefer to place our decision of the case upon the simple ground stated, that does not mean that we think that the actual payments by the company to the fund in respect of the taxpayer formed, in the year in which they were so paid, any part of his assessable income.

It is not, of course, a matter that arises for decision in the present case, but, to avoid misunderstanding, it is, we think, desirable to say that on the frame of the regulations we find it by no means easy to see how the sums so contributed can be regarded as allowed granted or given to the employee when they are paid to the administrators of the fund. It is only after the administrators have exercised their discretion that any moneys paid to the special account are reflected in the member's (employee's) account, and even then that does not mean that the member becomes presently entitled to the moneys credited to that account.

We do not think that s. 19 can be used to eke out s. 26 (*e*) and extend its operation or application.

There are two questions in the case stated, one dealing with moneys treated as reflecting the principal contributed by the company in respect of the taxpayer, the other dealing with moneys treated as representing or reflecting interest referable to that

principal and interest referable to moneys treated as reflecting the contributions to the fund made by the taxpayer.

In our opinion, for the reason we have given, both questions should be answered by saying that no part of the sums to which they refer form part of the assessable income of the taxpayer.

WEBB J. Case stated by *Williams* J. The appellant Constable is an employee of the Shell Co. of Australia Ltd. On 22nd June 1936 as such employee he became a member of a Provident Fund of Combined Petroleum Companies. The Shell Co. was also a member. The regulations governing this fund must be set out at some length for the purpose of determining the nature of the payments into and out of the fund. These regulations provide *inter alia*:

(1) By art. 2 that the object of the fund is to accumulate for the benefit of the companies' employees who have joined the fund (which they may do on the recommendation of the company employing them) certain sums as a provision for themselves and their families;

(2) By art. 3 that the entire management and administration of the fund is to be entrusted to a board;

(3) By art. 5 that the fund is to consist of certain foundation moneys, contributions of the employees of companies who have joined the fund and of those companies, and interest and other revenues earned;

(4) By art. 7 that each member shall pay into the fund ten per centum of his salary;

(5) By art. 8 (1) that a company is to pay into the fund an amount equal to that paid in by each of its employees;

(6) By art. 8 (4) that contributions paid into the fund are to be booked to the credit of a special account and at the close of each year the board is to decide, after giving consideration to the assets and liabilities of the fund, what amount is to be transferred to the credit of members;

(7) By art. 8 (6) that a separate account for each member is to be kept in the books of the fund in which is to be entered the amounts paid in by him and by his company; and that moneys in the special account not transferred, and any accrued interest therein, are to be credited to a suspense account in the name of each member, and when the board thinks that the liabilities as compared with the assets of the fund justify a transfer, such transfer is to be made to the credit of members in proportion;

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(8) By arts. 10, 11 and 19 that a company may pay into the fund to the credit of its employees an additional percentage of the employees' salaries or a certain percentage of the company's profits or other specified sums; that as soon as a member's account has reached £10,000 he may stop his payments, and the company's payments will then be made to the special account and the fund will pay it to the member, and any such extra percentage of profits is to be settled direct between the employee and the company;

(9) By art. 12 that the moneys of the fund are to be invested as the board determines; interest and profits are to be credited and losses debited to an "interest account", and any balance after providing for special reserves that the board thinks desirable are to be distributed among the "participants'" accounts, the suspense account and the reserve account in proportion to their respective amounts;

(10) By art. 13 that each member shall receive a yearly statement of his account;

(11) By art. 14 that while a member is an employee of the company he is to have no claim to a refund of amounts standing to his credit;

(12) By art. 15 that the amount standing to the credit of a member, after deducting amounts owing to the company, is to be paid out to him within six months after the termination of his service;

(13) By art. 16 if a member has less than a specified period of service—five years in the appellant's case—he is to have no claim for amounts credited to his account, but only for amounts he had himself paid in and interest accrued thereon. But the board on the proposal of his company has power in a special case to decide that he is also to receive part of the amounts paid in by his company and credited to his account;

(14) By art. 17 that if a member under fifty leaves the company's service within twenty years the board may withhold the amount standing to his credit until he reaches fifty, but he is not to participate in additional percentages and profits paid in by the company;

(15) By art. 18 that if a member dies whilst in the service of the company the amount standing to his credit is to be paid to his estate;

(16) By art. 20 that the rights of members to amounts due from the fund are personal and cannot be assigned or pledged; and that if a member infringes this provision he is at the discretion of the board to forego the benefit of the contributions of the company,