and that, therefore, the issue depended upon a comparison of the two marks. After comparing the two marks he held that there was no risk of confusion between them, and, accordingly, on 7th September, 1951, he dismissed the opposition.

From this decision the opponent, pursuant to ss. 43 and 45 of the Act appealed directly to the High Court of Australia.

J. G. Norris, Q.C. and *K. A. Aickin*, for the appellant.

G. A. Pape, for the respondent.

Cur. adv. vult.

March 17.

THE COURT delivered the following written judgment :—

This is an appeal by Cooper Engineering Co. Pty. Ltd. from a decision of the Registrar of Trade Marks dismissing its opposition to the granting of an application by the respondent, Sigmund Pumps Limited, for registration as the proprietor of a trademark consisting of the word " Rainmaster " in Class 7 in respect of water spraying installations for horticultural and agricultural purposes and parts thereof. The appellant has been since 27th January 1934 registered as the proprietor in the same class of the word " Rain King " in respect of spray nozzles, sprinklers and their parts. Since this date the appellant has used and advertised this trademark extensively on its spray nozzles and sprinklers and has built up a substantial business in these articles. It contends that the respondent's application to register the word " Rainmaster " as a trademark should be refused because registration is sought in respect of the same description of goods and so nearly resembles the appellant's trademark as to be likely to deceive (s. 25 of the *Trade Marks Act* 1905-1948) or alternatively that it should not be registered because it is a mark the use of which would be likely to deceive (s. 114 of the Act). The meaning of ss. 25 and 114 of the Act was discussed in *Lever Bros. Ltd.* v. *Abrams* (1), and it is there said that s. 25 is intended to protect one trader or one trademark against another trader or another trademark, while s. 114 is intended to protect the public from being deceived by the use of confusing marks. Section 114 is wider than s. 25 as it applies to cases where the goods are not of the same description and to cases where the mark is objectionable on grounds other than that it is likely to deceive. But these differences are immaterial in the present case as it is admitted that

(1) (1909) 8 C.L.R. 609.

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the respondent's goods are goods of the same description as the appellant's goods, and the sole question is whether the word "Rainmaster" so resembles the word "Rain King" as to be likely to deceive.

The proper approach to the answer to this question is well settled. It was summed up by Lord *Parker* (then *Parker* J.) in *In the Matter of an Application by the Pianotist Company Ltd. for the Registration of a Trade Mark* (1), "You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case." To the same effect see *Australian Woollen Mills Ltd.* v. *F. S. Walton & Co. Ltd.* (2); *Reckitt & Colman (Aust.) Ltd.* v. *Boden* (3), in this Court. It is sufficient if persons who only know one of the marks and have perhaps an imperfect recollection of it are likely to be deceived: *Aristoc Ltd.* v. *Rysta Ltd.* (4). The onus of proving that there is no reasonable likelihood of deception lies upon the applicant for registration. If the question is left *in dubio* the application must be refused: *Eno* v. *Dunn* (5).

In the present case the prefix of the two words is the same word "Rain", but the suffix "master" differs from the suffix "King" in appearance and in sound. This makes the two marks as a whole quite distinct and the marks must be judged as a whole. "Rainmaster" does not look like "Rain King" and it does not sound like it. There is not a single common letter in master and in King. The two words are so unlike to the eye and to the ear that counsel for the appellant was forced to rely on the likelihood of deception arising from the two words conveying the same idea of the superiority or supremacy of the article as a mechanism for making a spray similar to falling rain or artificial rain as it was

(1) (1906) 23 R.P.C. 774, in a passage appearing on p. 777.
(2) (1937) 58 C.L.R. 641, at p. 658.
(3) (1945) 70 C.L.R. 84.
(4) (1945) A.C. 68, at p. 86.
(5) (1890) 15 App. Cas. 252, at p. 256.

called during the argument. But it is obvious that trademarks, especially word marks, could be quite unlike and yet convey the same idea of the superiority or some particular suitability of an article for the work it was intended to do. To refuse an application for registration on this ground would be to give the proprietor of a registered trademark a complete monopoly of all words conveying the same idea as his trademark. The fact that two marks convey the same idea is not sufficient in itself to create a deceptive resemblance between them, although this fact could be taken into account in deciding whether two marks which really looked alike or sounded alike were likely to deceive. As Lord *Parker* said in the passage cited, you must consider the nature and kind of customer who would be likely to buy the goods. A purchaser of spray nozzles and sprinklers would not be likely to be lacking in discernment. He would not be in a hurry to buy. He would not be likely to pay any attention to the presence of a common word like rain in the conbination. That prefix already appears in other trademarks for goods of the same description sold on the Australian market such as Rainwell, Rainmaker, Rain Queen, and Rainbow. The learned registrar was right in holding that the only similarity between the two marks is the common prefix "Rain" and that this similarity is not sufficient to create a reasonable likelihood of deception when the remaining portions of the marks are so different.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *J. C. Rickard, Symonds & Co.*, Sydney, by *Abbott, Stillman & Wilson.*

Solicitors for the respondent, *Madden, Butler, Elder & Graham.*

R. D. B.

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

DIXON . . . . . RESPONDENT.

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SYDNEY, *Aug.* 18, 19; *Dec.* 11.

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

Taxation—Income tax—Assessable income—Employee—Enlistment in defence forces—Remuneration—Difference between employee's war service pay and civil remuneration—Difference paid by employer—Liability to tax—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *ss.* 6, 23 (5), 23B, 25, 26 (*d*), (*e*)—*Defence Act* 1903-1941 (*No.* 108 *of* 1903—*No.* 4 *of* 1941), *s.* 118A (3).

A sum provided by an employer to make up during the war the difference between the military pay of an employee who had enlisted and the pay he would have received in his civilian occupation forms part of the soldier's assessable income.

So *held* by *Dixon* C.J., *Williams* and *Fullagar* JJ. (*McTiernan* and *Webb* JJ. dissenting).

CASE STATED.

In the year ended 30th June 1943, Fletcher Clendon Dixon, who was then serving in the defence forces, was paid by his employers Messrs. Macdonald, Hamilton & Co., an amount of £104 in weekly instalments of £2, in pursuance of an undertaking given by that firm to make up to any one of its employees who should enlist the difference between the amount of his pay as an employee of the firm at the time of his enlistment and his pay as a member of the defence forces. The decision of the Commissioner of Taxation, upon an objection by the taxpayer, that the said amount of £104 was properly included in the taxpayer's assessable income was not upheld by the Board of Review. Upon an appeal by the commissioner against the decision of the Board of Review, *Williams* J., at the request of the parties, stated a case for the

opinion of the Full Court of the High Court, substantially as follows :—

1. At all material times prior to 12th July 1940 the respondent was employed by Messrs. Macdonald, Hamilton & Co., shipping agents, as a clerk in its Sydney office.

2. On 12th July 1940 the respondent voluntarily enlisted for service in the Australian Imperial Forces and from shortly after that date until he was discharged on 13th December 1945 served in those forces in Australia and overseas. A few days before his enlistment aforesaid and subsequently to 22nd September 1939 the respondent notified his employers that he had taken a medical examination and expected to be called up.

3. At the date of his enlistment the respondent was receiving from Messrs. Macdonald, Hamilton & Co. payment for his services as its employee at the rate of £245 14s. 0d. per annum, which remuneration ceased upon the commencement by the respondent of his service with the said forces.

4. From the date of the commencement of his service with the said forces until the date when he commenced to work again for Messrs. Macdonald, Hamilton & Co. as hereinafter mentioned Messrs. Macdonald, Hamilton & Co. paid to the respondent a sum of money equal to the difference between the rate of his military pay and the rate of pay being received by the respondent as a clerk in its employ as at 12th July 1940.

5. In the period of twelve months ended 30th June 1943 the difference hereinbefore referred to amounted to the sum of £104.

6. The said sum of £104 was actually paid by Messrs. Macdonald, Hamilton & Co. upon the instructions of the respondent to another employee of Messrs. Macdonald, Hamilton & Co., who at the request of the respondent handed it to the mother of the respondent.

7. On or about 22nd September 1939 Messrs. Macdonald, Hamilton & Co. inserted in its staff memorandum book a memorandum dated 22nd September 1939. A true copy of the memorandum which was annexed contained, *inter alia*, the following material paragraph : " In regard to those members of our Staff who may enlist for home defence or for service outside Australia, for the duration of the War, we shall also endeavour to make up the difference between their present rate of wages and the amounts they will receive from the Naval or Military Authorities, but of course circumstances may compel us to review this decision at some later stage."

8. Shortly prior to his enlistment the respondent read that memorandum.

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9. Shortly prior to his discharge from the said forces on 13th December 1945 the respondent interviewed an employee of Messrs. Macdonald, Hamilton & Co. and asked him whether Messrs. Macdonald, Hamilton & Co. would like the respondent to commence working for that firm again and the respondent was given an affirmative answer.

10. On 2nd January 1946 the respondent commenced to work again for Messrs. Macdonald, Hamilton & Co.

11. The respondent did not at any time give an undertaking to Messrs. Macdonald, Hamilton & Co. that he would return to its employ upon the completion of his war service, nor did Messrs. Macdonald, Hamilton & Co. at any time give to the respondent an undertaking that they would re-employ him upon completion of his war services.

12. For the year ended 30th June 1943 the respondent lodged a return of his income with the appellant and disclosed his income as the sum of £321. That sum of £321 included the said sum of £104 and was made up as follows :—

(a) Salary from Macdonald, Hamilton & Co. ..	£104
(b) Pay and allowances including subsistence as a member of the defence forces	£217
	£321

13. Shortly after lodging the return the respondent lodged with the appellant an amended return which omitted any reference to the said sum of £104 and contained the following note across the face of the return :—" Military pay under £250. Previous return showed other figures which are not income but a gift by my previous employers to me. Gratuitous payment."

14. On 17th July 1944 the appellant issued a notice of assessment as required by the said Act wherein the appellant assessed the amount of tax payable by the respondent for the period of twelve months ended 30th June 1943 in the sum of £26 13s. 0d., based upon a taxable income of £223, which said sum of £223 was arrived at after taking into account the said sum of £104 as portion of the assessable income of the respondent.

15. By letter dated 5th August 1944 the respondent objected to that assessment and the material portion of the letter was in the following terms :—" With regard to the 1943 assessment, he has requested us to object to this assessment on his behalf on the following grounds :—

1. The assessment is not in accordance with the amended return furnished by him.

2. The amount of income received by him from the military is not taxable.

3. The amount received by him from his employers has been included in the assessment and is not subject to tax for the following reasons :—

(a) The payment made by his employer was not income but a gratuitous payment.

(b) These payments are not for services rendered as our client has spent over three years in the Army.

(c) We claim that these payments are in the nature of a personal gift or tribute or present by his employer and not income subject to tax."

16. The appellant, after considering the objections, disallowed them and on 15th November 1944 gave to the respondent written notice of such disallowance.

17. The respondent, being dissatisfied with the decision of the appellant upon the objections duly requested the appellant in writing to refer the decison to a Board of Review for review.

18. The appellant accordingly referred the decision to a Board of Review for review and the board, after taking evidence and hearing the appellant and the respondent by their respective representatives, upheld the objections of the respondent and directed that the assessment should be amended by omitting the said sum of £104 in computing the assessable income of the respondent.

The appellant appealed to the High Court of Australia from the whole of the decision of the Board of Review upon the grounds—

(i) That the Board of Review was in error in upholding the respondent's claim (a) that the amount of £104 received by him during the year ended 30th June 1943 was not assessable income derived by him and (b) that the respondent had been wrongly assessed for income tax in respect of the said amount of £104; and

(ii) That the Board of Review should have held that the said sum of £104 was assessable income derived by the respondent during the year ended 30th June 1943.

The question of law stated by *Williams* J. for the determination of the Full Court of the High Court was: Whether the said sum of £104 referred to in this case was assessable income of the respondent for the period of twelve months ended 30th June 1943 ?

G. E. Barwick Q.C. (with him *J. D. Evans*), for the appellant. The definition of " income from personal exertion " in s. 6 of the *Income Tax Assessment Act* 1936-1943 is very wide. The significant words are " gratuities . . . received in the capacity of

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employee ". By par. (*e*) of s. 26 of the Act, " assessable income " includes the value to the taxpayer 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. The significance of the proviso to par. (*e*) and its reference back to par. (*d*) is the reference to any employment. In the earlier part of par. (*e*) is quite clearly a reference to a past as well as a present employment because gratuities or allowances are conceived to include the same allowances or gratuities or compensations as are mentioned under par. (*d*) which are, on their face, compensations in respect of employments which have been terminated. The situation in law of the employment of an employee who enlisted for service during the war was governed by two relevant provisions, namely (i) sub-s. (3) of s. 118A of the *Defence Act* 1903-1941, inserted by Act No. 36 of 1917, apparently to obviate the effect of the decision in *Marshall* v. *Glanvill* (1), and provides that enlistment does not terminate a contract of employment but merely suspends it; and (ii) the *National Security* (*Reinstatement in Civil Employment*) *Regulations* 1939-1944, which provided that all periods of war service were, for the purpose of determining certain rights of the employee, to be deemed to be service in his employment. From the point of view of the facts of the matter a relationship of employer and employee remained notwithstanding the enlistment of the taxpayer. The complete obligation of that relationship did not persist because the employee was not bound to serve nor the employer to pay. But so far as possible the relationship was otherwise maintained because he was to be treated as employed and as actually serving for the purpose of, *inter alia*, leave of absence and pension rights: see *Commissioner of Railways* (*N.S.W.*) v. *McCulloch* (2). In *In re Feather*; *Harrison* v. *Tapsell* (3) it was held that the relationship of employer and employee remained although the person concerned was on military service and was not serving in the employment at all. The money came to the taxpayer because he both had been and was an employee of the company. The amount of the payment was related to and quantified by the wages which would have been earned if the taxpayer had been able to serve in the employment. It was a weekly recurrent amount. One looks principally at this " through the eyes " of the recipient, but may throw one back, to some extent, to look at the circumstances of the paying; of the payer's circumstances when paying. The object of the payment was to

(1) (1917) 2 K.B. 87.
(2) (1946) 72 C.L.R. 141.
(3) (1945) Ch. 343.

maintain the income of the recipient. It is a clear compensation to him for his inability to earn wages. Money so received is income which is a gratuity received in the capacity of employee within the meaning of s. 26 (*e*) of the Act. The word " employee " in the expression " capacity of employee " in that paragraph is not a reference to employee under a current employment, because if it were there would not be any place for the words " retiring allowances or retiring gratuities ", and it is of the very essence of the allowance or gratuity in that instance that he should not be an employee under a current arrangement of employment. The expression " capacity of employee " does not mean " capacity of a person presently employed " but is wide enough to cover gratuity received in the capacity of employee who has ceased to be an employee. The right view is that the taxpayer received the money in his capacity of employee, not merely because he was an employee, or had been, but there was not any other capacity to which the money could be referable when there is borne in mind the amount of it ; the occasion of it ; payment ; &c. The question is not : was this a gift, or was it remuneration ? The definition in s. 6 is very wide ; it is much wider than any definition in the decided cases. It is certainly wider than in English decisions on the question of whether such an amount as is presently in question is or is not income. This payment properly satisfies the expression " gratuities received in the capacity of employee ". All that matters is the capacity. Whether it be on the hypothesis that the employment ceased, or on the hypothesis that the statutory provision kept it on foot, this satisfied the definition. A recurrent payment, not an odd sum, quantified by relation to wages, expected to continue for an indefinitely long period of time, made by the employer to a person who is either a present or past employee, gratuitously maybe, is a gratuity received in the capacity of employee. The words " value to the taxpayer " in par. (*e*) of s. 26 are simply chosen to indicate the great widths of the payments or benefits which are to be brought to tax. The word " all " as there used, is unqualified, and covers all voluntary payments. The word " compensations " is used ; a very tenuous relationship to employment is adequate to satisfy the statute. The money was a gratuity in relation, directly or indirectly, to his employment. The motive of the employer is immaterial. The matter must depend on whether it can be said that the money is given, granted or allowed in relation to any employment. It was held in *Scott* v. *Commissioner of Taxation* (1) that compensation under a statute for loss or

(1) (1935) 35 S.R. (N.S.W.) 215 ; 52 W.N. 44.

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deprivation of office was not taxable, but that was a case of statutory construction of the particular statute and concerned a lump sum payment not a recurrent weekly payment. The Act in s. 26 (*e*) clearly evidences an intention to bring to tax all benefits, pecuniary or otherwise, which the circumstances of the employment, past or present, bring to the taxpayer. It was held in *Louisson* v. *Commissioner of Taxes* (1), following *Marshall* v. *Glanvill* (2) that the contract of employment in New Zealand was not continued during the period of military service. The scheme there was to remove completely the relationship during the period of military service, and that a resumption of employment should be on contractual terms.

[DIXON C.J. referred to *National Association of Local Government Officers* v. *Bolton Corporation* (3).

FULLAGAR J. referred to *Federal Commissioner of Taxation* v. *Midland Railway Co. of Western Australia Ltd.* (4).]

The following cases would have been differently decided under the *Income Tax Assessment Act* 1936-1943 owing to the presence in that Act of s. 26 (*e*) and the use of the expression " in relation directly or indirectly to any employment " ; *Cowan* v. *Seymour* (5) ; *Seymour* v. *Reed* (6) ; *Calvert* v. *Wainwright* (7) ; *Weston* v. *Hearn* (8) ; *Coxe* v. *Employers' Liability Assurance Corporation Ltd.* (9) ; and *Louisson* v. *Commissioner of Taxes* (1). The words " directly or indirectly " and " in relation . . . to " in s. 26 (*e*) widen the scope of the tax far beyond anything that could be expected under the English schedule. The motive of the employer in this case is quite irrelevant (*Cooper* v. *Blakiston* (10) ; *Chibbett* v. *Joseph Robinson & Sons* (11) ; *Herbert* v. *McQuade* (12)). The tendency is always to regard a payment which is in substitution for income as having the quality of income (*Commissioner of Taxes (Vict.)* v. *Phillips* (13)). The point of view now addressed to the Court would have been conceded in *National Association of Local Government Officers* v. *Bolton Corporation* (14) because it was implicit in the way their Lordships approached the matter that

(1) (1942) N.Z.L.R. 30 ; (1943) N.Z.L.R. 1.
(2) (1917) 2 K.B. 87.
(3) (1943) A.C. 166, at pp. 178, 187, 195.
(4) (1952) 85 C.L.R. 306.
(5) (1920) 1 K.B. 500, at pp. 509-511, 516, 517.
(6) (1927) A.C. 554, at pp. 569, 572.
(7) (1947) 1 All E.R. 282.
(8) (1943) 2 All E.R. 421, at p. 422.
(9) (1916) 2 K.B. 629, at p. 634.
(10) (1907) 2 K.B. 688, at pp. 702, 703 ; (1909) A.C. 104.
(11) (1924) 9 Tax Cas. 48, at pp. 59, 61.
(12) (1902) 2 K.B. 631, at p. 649 ; 4 Tax Cas. 489.
(13) (1936) 55 C.L.R. 144, at pp. 155, 157.
(14) (1943) A.C., at pp. 178, 186, 194, 195.

if they had been dealing with the section as this gratuity in relation to any employment they, conformably with what they said, would have answered the question in the way now addressed to the Court.

G. Wallace Q.C. (with him *B. P. Macfarlan* Q.C. and *R. A. Howell*), for the respondent. The *Income Tax Assessment Act* 1936-1943 does not provide that all payments of whatsoever kind made by an employer to an employee shall be assessable for tax. On the contrary the Act envisages that there must be some such payments which are not assessable for tax, and the Act purports to give in the widest terms what payments shall be assessable. The scheme of the Act, so far as this matter is concerned, is to have a general definition of income arising from personal exertion in s. 6, that means, true income, colloquially considered, wages, salaries and the like, into which the element of personal exertion enters, and is comparatively straightforward, yet quite a wide general definition. If there be income which comes within the sort of genus of the section but is omitted from the species enumerated above, it follows as a matter of construction that that sort of income would not be taxable. Here, the gifts made are not in the nature of income as envisaged by the Act at all. One can understand the income arising from the conduct of a business or profit-making scheme being taxable even though not within the literal definition, but where there is something which is intended to be a gift and which is not associated as far as the recipient is concerned either with his employment or with any services rendered, and it is a mere case of a series of recurring gifts, it falls outside the taxing sections. The taxpayer was away, engaged on a full time job in the army. He was not in employment, nor even under a contract of employment, notwithstanding s. 118A of the *Defence Act* 1903-1941. The payments were merely a series of recurring gifts received by the recipient in his character of a soldier and not in his character of an employee. By reason of s. 18 of the *National Security Act* 1939, as amended, regulations made under that Act prevail over other statutory provisions. It is impossible to read s. 118A of the *Defence Act* 1903-1941 with the *National Security (Reinstatement in Civil Employment) Regulations* 1939-1944 because that section provides something quite contrary to the regulations and imposes the burden on the employer to reinstate in the former employment, so that the regulations do not speak of suspension or of a continuation of the contract, but, on the contrary, clearly envisages that the contract is terminated. There cannot be a contract of employment subsisting and suspended consistent with

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the concept that the employment no longer subsists, but gives the right to the employee to be reinstated in his former employment. At all relevant times s. 118A of the *Defence Act* was inoperative. The applicable law was as set forth in the *National Security* (*Reinstatement in Civil Employment*) *Regulations*. The subject contract, therefore, had terminated legally, and *Marshall* v. *Glanvill* (1) is applicable and *Louisson* v. *Commissioner of Taxes* (2) is persuasive. The word " employment " as used in s. 118A of the *Defence Act* has a different characterization from the word " employment " as used in s. 26 (*e*) of the *Income Tax Assessment Act*. In s. 118A it is a contract of employment which is referred to, and that contract of employment was kept on foot by the Act in a state of suspension, but in s. 26 (*e*) Parliament had in mind something vastly different. The phrase is " employment or services rendered ". Parliament had in mind an employment where occupation by the employee was taking place or had taken place. The word " employment " must be taken to mean occupational employment, and not be confined to a contract of employment such as is referred to in s. 118A. It is not possible for sub-s. (3) of s. 118A and the amended regulation to exist side by side. The money received by the taxpayer was received by him in his capacity of a soldier and s. 26 (*e*) does not apply, and certainly s. 6 does not apply. Even if s. 118A is applicable and operative to this case, and even if the contract of service is in existence but suspended, the taxpayer is entitled to succeed because of the character in which the moneys were received. The word " indirectly " in s. 26 (*e*) is not applicable unless there be an appropriate relationship. All " indirectly " does is to widen to a maximum extent the quality of relationship. In this case there is not any relationship. The expression " in relation to " means that the Act does not strike at all gifts whatsoever from an employer to an employee. That expression means a real nexus between the services rendered and the gift. There must be a connection between the purpose of the gift and either the employment or the services rendered. The position in this case is that the employer, realizing that former employees might suffer as a result of their national service, was minded to be bountiful, the object of his bounty being his employees and they received the money in the character of soldiers. Questions of motive cannot be disregarded. The words " directly or indirectly " and " in relation . . . to " in s. 26 (*e*) were intended to make taxable payments

(1) (1917) 2 K.B. 87.

(2) (1942) N.Z.L.R. 30; (1943) N.Z.L.R. 1.

which have a substantial and real connection with the employment. In this case there was not any connection with the actual employment except in so far as they were words of prescription. The employer was not under any duty at that stage to give the money, and the taxpayer was not under any duty to return it to the employer. There was not any obligation on either side. The fact that the amount paid was arrived at by reference to what had been paid to the taxpayer as an employee was a mere " yard stick " for the employer as to the extent that the gift should be made. The gift was not made to the taxpayer merely because he was an employee of the employer, but even if it were so made it would not be caught by s. 26. It was a reward for enlisting, and none the less so because it was given to an employee ; it still remained in essence a reward for enlisting. The Court will not gather much assistance from *In re Feather* ; *Harrison* v. *Tapsell* (1) and that type of case, such as *In re Bedford dec'd.* ; *National Provincial Bank Ltd.* v. *Aulton* (2) ; *In re Marryat* ; *Westminster Bank* v. *Hobcroft* (3) ; *In re Drake* ; *Drake* v. *Green* (4) and *In re Cole* ; *Cole* v. *Cole* (5), where because of the circumstances and the wording in the respective Acts some of the decisions go one way and some the other. A distinction is drawn between services and contracts of employment (*In re Cole* ; *Cole* v. *Cole* (5) ; *In re Bedford dec'd.* ; *National Provincial Bank Ltd.* v. *Aulton* (2)). Those cases, so far as s. 26 (*e*) is concerned, are not completely in point. This case should be decided upon the meaning of the words " in relation . . . to ". There must be a real relationship, however remote, with services rendered and employment. " Employment " as there used does not mean only contract of employment : it means contract plus submission. *Commissioner of Taxes* (*Vict.*) v. *Phillips* (6) is not in point, because the Court was dealing with what was indubitably income at one stage and considering that into which it had been converted was still in effect the same income. Much the same sort of issue was involved in *Federal Commissioner of Taxation* v. *Midland Railway Co. of Western Australia Ltd.* (7) ; therefore that case also is not in point. The issue there dealt with had no connection with the issues which arise under s. 6 and s. 26 (*e*). There is not any question of substitution involved. It is merely an issue as to whether a charitably minded employer has made a gift which has a relation to the employment, or whether it has no such relation. It is common

(1) (1945) Ch. 343.
(2) (1951) Ch. 905.
(3) (1948) Ch. 298.
(4) (1921) 2 Ch. 99.
(5) (1919) 1 Ch. 218.
(6) (1936) 55 C.L.R. 144.
(7) (1952) 85 C.L.R. 306.

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ground that the employer made a gift. When the taxpayer received the moneys there was not any relationship of employer and employee at all: he was then a full-time soldier. The word "capacity" has a meaning somewhat equivalent to role. There was not any element of personal exertion as envisaged by s. 6. The taxpayer is not caught by that section. Under the scheme of the Act unless income can be included in a specific definition it is not taxable. The position was different under the Act under consideration in *Scott* v. *Commissioner of Taxation* (1) and the views there expressed are not applicable to the Act now under consideration. There is a critical distinction between the first-mentioned Act and the Act now under consideration. Under the latter Act there cannot be income which is income according to the "usage of mankind". The gratuity in *Cowan* v. *Seymour* (2) undoubtedly had a relationship with past services and therefore should be taxable. *Blakiston* v. *Cooper* (3) was not dealt with on the test of motive at all, but rather on the test, the correct test: in what character did the recipient receive the money? As regards s. 26 (*e*) no relationship of an appropriate nature has been revealed in the evidence or the findings, therefore "indirectly" does not come into the matter, and there was neither evidence nor findings to show that the taxpayer received the money in the capacity of an employee. The "capacity" of a member was dealt with in *Municipal Permanent Investment Building Society* v. *Richards* (4).

G. E. Barwick Q.C., in reply. Section 25 shows that s. 6 and other sections of the Act do not preclude the Court from finding that the subject amount, a recurring payment received by the taxpayer, was not income in the common acceptation of that word. The source of this income was really the employment; "alternatively, it was a profit according to the ordinary usages and concepts of mankind" (*Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (5)). The fact that a gift was unenforceable has not prevented a regularly recurring receipt from being regarded as income (*In re The Income Tax Acts* (*No.* 2) (6)). The word "re-instate" in the *National Security* (*Reinstatement in Civil Employment*) *Regulations* was not inconsistent with the continuance of the employment (*Commissioner for Railways* (*N.S.W.*) v. *McCulloch* (7)). The payment was not made because of the enlistment *per se*: only those persons received it

(1) (1935) 35 S.R. (N.S.W.), at p. 219; 52 W.N. 44.
(2) (1920) 1 K.B. 500.
(3) (1909) A.C. 104.
(4) (1888) 39 Ch.D. 372, at p. 386.
(5) (1946) 73 C.L.R. 604, at p. 621.
(6) (1901) 27 V.L.R. 39, at p. 41.
(7) (1946) 72 C.L.R., at p. 157.

from this employer who had been in its employ (*Blakiston* v. *Cooper* (1)). The words " capacity of employee " are quite apt to cover the case of a person who has ceased to be an employee (*Stedeford* v. *Beloe* (2)). In *Herbert* v. *McQuade* (3), where the facts are not so strong as are the facts in this case, an annual grant from a diocesan branch affiliated with a sustentation fund, not the employer, the payment of the grant being a matter of discretion, was held to be income. The question whether the taxpayer is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company (*In re Feather* ; *Harrison* v. *Tapsell* (4)).

G. Wallace Q.C., by leave, referred to *Smith* v. *Smith* (5) and *Stedeford* v. *Beloe* (2) on the question of the nature of a recurring allowance by way of gift.

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

DIXON C.J. AND WILLIAMS J. The question in the case stated is in effect whether a sum provided by an employer to make up during the war the difference between the military pay of an employee who had enlisted and the pay that he would have received in his civilian occupation forms part of the soldier's assessable income. The taxpayer was, up to 12th July 1940, employed as a clerk by Macdonald, Hamilton & Co., a firm of shipping agents. His remuneration was £245 14s. 0d. per annum. On 12th July 1940 the taxpayer voluntarily enlisted for service in the Australian Imperial Forces and served both in Australia and overseas from shortly after that date until 13th December 1945, when he was discharged from the Army. The year of income under assessment is that ended 30th June 1943, and during that year Macdonald, Hamilton & Co. paid the taxpayer £104 to make his military pay up to the amount which he would have received had he been in their employ. On 22nd December 1939 Macdonald, Hamilton & Co. had sent a circular notification to the members of their staff concerning the policy with respect to their staff which they proposed to follow during the war. It included the following paragraph : " In regard to those members of our staff who may enlist for home defence or service outside Australia, for the duration of the War, we shall also endeavour to make up the difference between their

(1) (1909) A.C., at p. 108.
(2) (1932) A.C. 388 ; 16 Tax Cas. 505.
(3) (1902) 2 K.B. 631.
(4) (1945) Ch. 343.
(5) (1923) 39 T.L.R. 632, at pp. 633, 634.

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present rate of wages and the amounts they will receive from the Naval or Military Authorities, but of course circumstances may compel us to review this decision at some later stage". This notification was inserted in their Staff Memorandum Book and there the taxpayer read it before he enlisted. Shortly before his discharge on 13th December 1945 he ascertained that Macdonald, Hamilton & Co. wished him to resume work with them and on 2nd January 1946 he commenced his duties with that firm. He had not, however, at any time given them an undertaking that he would return to their employ upon completion of his war service, nor had they given him an undertaking that they would re-employ him upon completion of his war service. Having regard to the foregoing facts, the commissioner included the amount of £104 in the taxpayer's assessable income for the year ended 30th June 1943. The taxpayer brought in objections and, upon them being disallowed, requested that they should be referred to a Board of Review. The Board of Review decided that the amount provided by the employers as the difference between military pay and the pay the soldier would have received had he remained in their service did not form part of the taxpayer's assessable income. From that decision the commissioner has appealed to this Court.

The question whether the amount is assessable income depends on more than one provision of the *Income Tax Assessment Act* 1936-1943. The commissioner's case has been supported on the ground that according to ordinary conceptions of what is income, the derivation by the taxpayer of £104 from Macdonald, Hamilton & Co. as well as the derivation of his military pay, formed his income, and therefore became part of his assessable income. Both in support of this view and as an independent ground, the commissioner has also relied upon some words contained in the definition, in s. 6 of the *Income Tax Assessment Act* 1936-1943, of the expressions "income from personal exertion" and "income derived from personal exertion". Those words are "bonuses, pensions, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities received in the capacity of employee or in relation to any services rendered". The critical words here are "allowances and gratuities received in the capacity of employee or in relation to any services rendered". The commissioner further relies, but this time as an independent ground only, on the provisions of par. (*e*) of s. 26. By this paragraph it is provided that the assessable income of a taxpayer shall include the value to the taxpayer 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 to the paragraph excluding its application to any allowance, gratuity or compensation which is included in par. (*d*) of s. 26. Paragraph (*d*) includes in the assessable income five per cent of the capital amount of any allowance, gratuity or compensation where that amount is paid in a lump sum in consequence of retirement from, or termination of, any office or employment. The proviso to par. (*e*) is relied upon as showing that that paragraph extends to payments made on or after the termination of an employment as well as to payments made during the employment. Otherwise, so it is said, there would be no need of a proviso excluding its application to a payment made in consequence of retirement from or termination of an office or employment. For the purposes of par. (*e*) and, indeed, for the purposes of the words contained in the definition in s. 6 of " income from personal exertion ", the employment upon which the commissioner relied was that of Macdonald, Hamilton & Co., not the service of the Crown by the taxpayer as a soldier. In the same way the words " services rendered by him " were applicable, according to the argument for the commissioner, to the services formerly rendered by the taxpayer to Macdonald, Hamilton & Co., not to the services rendered to the Crown by the taxpayer as a soldier. We are not prepared to give effect to this view of the operation of s. 26 (*e*). Before turning to the other grounds upon which the commissioner rested his case, we shall state our reasons for declining to apply s. 26 (*e*) to the supplementary payments provided by Macdonald, Hamilton & Co. as allowances &c. given &c. in relation directly or indirectly to the taxpayer's employment by that firm or services rendered by him to them. There can, of course, be no doubt that the sum of £104 represented an allowance, gratuity or benefit allowed or given to the taxpayer by Macdonald, Hamilton & Co. Our difficulty is in agreeing with the view that it was allowed or given to him in respect of or in relation, directly or indirectly, to any employment of or, services rendered by him. It is hardly necessary to say that the words " directly or indirectly " extend the operation of the words " in relation . . . to ". In spite of their adverbial form they mean that a direct relation or an indirect relation to the employment or services shall suffice. A direct relation may be regarded as one where the employment is the proximate cause of the payment, an indirect relation as one

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where the employment is a cause less proximate, or, indeed, only one contributory cause. It may be conceded also that the proviso has an effect upon the construction of par. (*e*) of s. 26, but the effect is only to show that the allowance may be in consequence of a retirement from or termination of the office, not to show that a mere historical connection, as it may be called, is sufficient. We are not prepared to give s. 26 (*e*) a construction which makes it unnecessary that the allowance, gratuity, compensation, benefit, bonus or premium shall in any sense be a recompense or consequence of the continued or contemporaneous existence of the relation of employer and employee or a reward for services rendered given either during the employment or at or in consequence of its termination. To overcome the possible effect of such a view of the operation of s. 26 (*e*) reliance was placed upon s. 118A (3) of the *Defence Act* 1903-1941. This is a provision inserted during the war of 1914-1918 by Act No. 36 of 1917. Sub-section (3) of s. 118A is as follows :—" The rendering of the personal service or the enlistment referred to in this section shall not terminate a contract of employment, but the contract shall be suspended during the absence of the employee for the purposes referred to in this section ; but nothing in this section shall render the employer liable to pay an employee for any time when he is absent from employment for the purposes referred to in this section ". The enlistment referred to includes voluntary enlistment. It does not appear to us, however, that the applicability of s. 26 (*e*) can depend upon the difference between the suspension of the contract of employment and its termination. The contention that the allowance, gratuity or benefit was allowed or given to the taxpayer in relation to his employment by Macdonald, Hamilton & Co. or in relation to services rendered by him to them, cannot turn upon the difference between ending and suspending the operation of the contract of employment. That difference is only between the notional existence of a relationship, the actual rights and duties of which cease until upon a contingency they arise once more, and the cessation of the relationship itself, real or notional, so that the rights and duties are incapable of arising again, except by a new contract.

For the taxpayer it was suggested that the *National Security* (*Reinstatement in Civil Employment*) *Regulations* 1939-1944 were inconsistent with the continued operation of s. 118A (3). Regulasion 3 and in the case of the Citizen Forces reg. 7 may have amplified and particularized the rights of the serviceman, but for any purpose relevant to the commissioner's argument they did not so far as we can see detract from the operation of s. 118A (3),

whatever may be the effect of s. 8 of the *Re-establishment and Employment Act* 1945-1948. The use of the word " reinstatement " in reg. 7 does not imply that the employment is terminated and not suspended: cf. *Commissioner for Railways (N.S.W.)* v. *McCulloch* (1). But giving s. 118A its fullest application we remain unable to ascribe to s. 23 (3) the effect claimed for it on behalf of the commissioner. We therefore put that provision aside and proceed to deal with the contention that the payment is income, and forms part of the assessable income, according to ordinary principles.

Section 25 of the *Income Tax Assessment Act* 1936-1943 provides that the assessable income of the taxpayer shall include the gross income derived directly or indirectly, according to his residence from all sources or from all sources in Australia. Section 6 defines " assessable income " to mean all the amounts which, under the provisions of the Act, are included in the assessable income. As a result of s. 25 what is gross income derived directly or indirectly from all sources or all sources in Australia, as the case may be, depends upon what is income. The Commonwealth Act, unlike the *Income Tax Act* 1952 (15 & 16 Geo. VI. & 1 Eliz. II. c. 10) (Imp.), does not make the question of what is assessable or taxable income depend upon a series of express provisions dealing with the various kinds of income, such as those in schedules A, B, C, D and E of the British Act. It begins with the general conception of gross income and specifies in s. 23 what is exempt and in s. 26 and other sections particular classes of income that are to be included. Sometimes these classes of income appear to be specified simply for greater certainty, sometimes because they do not fall within the natural understanding of gross income, as, for example, in the cases mentioned in s. 36. The definition in s. 6 of " income from personal exertion " or " income derived from personal exertion " has always been used as a possible guide or test in cases where the question is whether a particular receipt is income or not. It is true that the definition is concerned only or chiefly with the difference, for the purposes of the rates of tax, between income from property and income from personal exertion, but, where any of the expressions contained in the definition are relevant, it is logical enough to use them as an indication that a given receipt is income.

In the present case we think the total situation of the taxpayer must be looked at to see whether the receipts of the taxpayer from Macdonald, Hamilton & Co. are of an income character. He was employed at a salary. The war placed him, in common

(1) (1946) 72 C.L.R. 141, at p. 150.

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with many others, in a position in which he felt it was incumbent upon him to enlist. At the same time to do so meant that the earnings upon which he and possibly his dependants subsisted would be much reduced. His employers recognized this fact and intimated that they would do their best to see that if he decided to join the fighting forces his military pay and allowances would be supplemented so that it would not mean a financial loss. The motives of his employers for doing this were, no doubt, predominantly patriotic, but their patriotic motives were doubtless reinforced by considerations of what was right and proper in relation to the staff and by a desire of providing some inducement to the members of the staff to return to the firm at the conclusion of the war. From the taxpayer's point of view, it is not unlikely that when he decided to enlist in the armed services, he relied to some extent upon the intimation he received from his employers. The result was to keep his income up to the standard that would have been maintained had he not enlisted. We have advisedly used the word "income" because, from his point of view, the contribution made by his employers meant that the periodical receipts upon which he depended for the maintenance of himself and his dependants remained at the same level as his civilian employment would have given. From his point of view therefore the word "income" would be clearly applicable to the total receipts from his military pay and allowances and from his civilian employers. It does not seem to matter whether these employers are regarded as his former employers, as his future employers or as the other party to a suspended employment. In the definition of "income from personal exertion" the expression "allowances and gratuities received in the capacity of employee or in relation to any services rendered", while it does not appear to us to include, as a matter of meaning, allowances and gratuities received by an employee after he has ceased to render any services and after his employment has completely terminated, nevertheless does seem to indicate that no contractual right to the allowance or payment need exist. Indeed, it is clear that if payments are really incidental to an employment, it is unimportant whether they come from the employer or from somebody else and are obtained as of right or merely as a recognized incident of the employment or work. This may be seen from such cases as *Cooper* v. *Blakiston* (1), *Herbert* v. *McQuade* (2), *Chibbett* v. *Joseph Robinson & Sons* (3), *Slayney* v. *Starkey* (4), *Hunter* v. *Dewhurst* (5) and *Calvert* v. *Wainwright* (6).

(1) (1907) 2 K.B. 688; (1909) A.C. 104.
(2) (1902) 2 K.B. 631; 4 Tax Cas. 489.
(3) (1924) 9 Tax Cas. 48.
(4) (1931) 16 Tax Cas. 45.
(5) (1932) 16 Tax Cas. 605.
(6) (1947) 1 All E.R. 282.

In the present case the employment or service, as we would emphasize, is as a soldier. The circumstances in which the taxpayer entered into that service were such as to enable him to rely with more or less confidence on the periodical payments from Macdonald, Hamilton & Co., as well as from his military pay, making up an "income" of the level appropriate to civilian service. Such an understanding is not confined to this particular employment. A widespread policy amongst employers both in Australia and in England led to this sort of thing being done. Decided cases in England dealing with other aspects of the matter show how widespread it must have been: see *National Association of Local Government Officers* v. *Bolton Corporation* (1); *Lally* v. *Durham County Council* (2). How extensive the practice or policy must have been is further shown by the two cases in New Zealand of *Louisson* v. *Commissioner of Taxes* (3) upon which counsel for the taxpayer so much relied. We do not think it necessary to say more concerning these two decisions than that, as will be seen from the reasons we have given, the difference in the conclusion we have reached arises chiefly in the difference of the conception we have formed of the character, as part of his income, of the regular periodical payments made to the soldier. Because the £104 was an expected periodical payment arising out of circumstances which attended the war service undertaken by the taxpayer and because it formed part of the receipts upon which he depended for the regular expenditure upon himself and his dependants and was paid to him for that purpose, it appears to us to have the character of income, and therefore to form part of the gross income within the meaning of s. 25 of the *Income Tax Assessment Act* 1936-1943.

Unfortunately supplementary payments, of the description in question, made to servicemen by their former employers during the war do not appear to fall within the exemption conferred by s. 23 (*s*) of the *Income Tax Assessment Act* 1936-1946 or s. 23B of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951.

For the foregoing reasons we answer the question in the case stated that the sum of £104 referred to in the case was assessable income of the respondent taxpayer for the period of twelve months ended 30th June 1943.

(1) (1943) A.C. 166.
(2) (1945) 1 All E.R. 311.
(3) (1942) N.Z.L.R. 30; (1943) N.Z.L.R. 1.

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McTIERNAN J. In my opinion the question in the case stated should be answered: No.

The Commissioner of Taxation contended that the sum of £104, as to which the case was stated, was included by par. (*e*) of s. 26 of the *Income Tax Assessment Act* 1936-1943 in the respondent's assessable income. The material terms of this paragraph are "all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him" (the taxpayer) "in respect of, or for or in relation directly or indirectly to, any employment of or services rendered". It may be conceded that the £104 was of the nature of one or more of these amounts.

The question which arises is whether the grant of this sum of money had a relation to the employment of the respondent or to services rendered by him. If the grant of it had the relation required under par. (*e*) either to the respondent's employment as a clerk with Macdonald, Hamilton & Co. or his military employment, the provisions of par. (*e*) would have been satisfied. Was this sum of money given to the respondent in respect of either of such employments? The case stated shows that it was not a remuneration relating to either employment. It shows, however, that, but for the circumstance that the respondent was in the employment of Macdonald, Hamilton & Co. and left it in order to join the Army, they would not have paid the sum of money to him. It was not paid upon any legal basis: the whole of it was paid at the mere will of the firm. This fact, by itself, does not, of course, prevent the sum from being included by par. (*e*) in the respondent's assessable income. It is plain from the terms of par. (*e*) that taxation was not meant to be escaped by reason of the special fact that payments made to an employee in respect of his employment were voluntary. The words of par. (*e*) are wide, but, I think, not wide enough to prevent an employer from giving money or money's worth to an employee continuing in his service or leaving it, without incurring liability to tax in respect of the gift. The relationship of employer and employee is a matter of contract. The contractual relations are not so total and all embracing that there cannot be personal or social relations between employer and employee. A payment arising from those relations may have no connection with the donee's employment. The contract creates the cash nexus upon which their mutual rights and obligations rest. The employee performs his part of the contract for money or money's worth, which may be paid as a matter of obligation or sometimes may be paid in part upon no legal basis. It is true to say of such amounts that they are paid or given

in respect of the employment of the recipient, whether paid during the employment or after it has ceased.

The scheme under which Macdonald, Hamilton & Co. paid the £104 to the respondent grew out of relations engendered by the contractual relationship. The scheme was ultra that relationship. It had nothing to do with the cash nexus between the firm and the respondent. But for the circumstance that he was in their employment when he enlisted he would not have received the £104. This is not a circumstance which necessarily made it a payment in respect of, or for or in relation directly or indirectly to, his employment. The case stated does not show that the sum flowed from the respondent's employment or his military service. It was a voluntary contribution made for a special purpose. The scheme under which it was paid was devised to save the firm's employees from financial loss due to enlistment. There was no connection between the payment and the services rendered by the respondent for Macdonald, Hamilton & Co. or between the payment and his military duties.

The Court was referred to statutory provisions dealing with the industrial rights or privileges of employees while in the army. It is not possible to discern any connection between the payment and the statutory relations produced by these provisions.

The sum of £104 was assessed as income from personal exertion. This class of income is defined by s. 6 (1) of the Act. The definition is exhaustive. It includes " allowances and gratuities received in the capacity of employee ". The commissioner contended that the sum was in this category of income from personal exertion. The sum of £104 was the total of a number of voluntary payments. All were made at the mere will of Macdonald, Hamilton & Co.: none was made upon any legal basis. They were at liberty to decline to make any of them. Indeed they made it clear that they might at any time cease to continue the payments. These were accidental additions to the respondent's financial means, so long as he was on active service and his military pay was less than his civilian pay. Were these payments received by the respondent in the capacity of employee ? Lord *Alverstone* cited in *Cooper* v. *Blakiston* (1) some observations made by *Stirling* L.J. in *Herbert* v. *McQuade* (2) which are in point. " I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity— and without the fulfilment of any further or other condition on his part ". It was necessary for the respondent to fulfil two other conditions besides being an employee. These

(1) (1907) 2 K.B. 688, at p. 697. (2) (1902) 2 K.B. 631, at p. 650.

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were, to join the Army and to be in receipt of military pay less than his pay as a clerk. The measure of the sum of £104 was this difference. It did not relate back to his employment as a clerk: it was not a payment in respect of services rendered as such nor in respect of military services. The sum was paid under a scheme designed to give financial relief to those employees of the firm who suffered financially because they enlisted. The payment of this sum of £104 to the respondent was determined by this personal equation. The fact that the payment was voluntary is not *per se* a reason why the sum should not be taxable. It is an element in the scheme. The sum was a special contribution made to the respondent by reason of the circumstance that he sacrificed some of his income by enlisting. This was the dominant and determining factor. The sum was in a sense paid to him *honoris causa*.

The commissioner relied strongly upon the following statement made by *Buckley* L.J. in *Cooper* v. *Blakiston* (1). "The question is not what was the motive of the payment, but what was the character in which the recipient received it? Was it received by him by reason of his office?" If this test is applicable here, it seems to me that it is not to the commissioner's advantage to apply it. What was the character in which the respondent received the sum of £104? I should say, that upon the facts found by the stated case, the respondent did not receive the sum in the character of an employee. He would not have received it unless he ceased to be an employee and it was not in any sense an augmentation of the remuneration paid to him as a civilian. As regards his military capacity, it was extraneous to that employment and a mere fortuitous addition to his military pay. It came to him merely in consequence of the bounty of his former employers. They made the payment in respect of his enlistment from their service. It was an acknowledgement of that fact not of his services for them. The bounty would diminish if he was promoted or his military pay was increased. The sum was not paid to impose any obligation upon the respondent to resume his former employment. If it is a material matter the respondent did not request that the payment be made. Neither the firm nor he contemplated that if he enlisted it would be a term of his employment that he would receive such a payment. The scheme contemplated that no payment would be made until further service with the donors was impossible owing to the respondent's enlistment. The respondent had no right to receive anything under the scheme.

(1) (1907) 2 K.B., at p. 703.

All the facts clearly point to this not being a payment in respect of the respondent's employment or in respect of services rendered by him or a payment to the respondent in his capacity as an employee.

The case of *Cooper* v. *Blakiston* (1) concerned Easter offerings received by the incumbent of a benefice. That decision was unfavourable to him. It seems to me that the decision proceeded upon distinctions which are very favourable to the respondent in the present case. Lord *Loreburn* said in the course of his judgment upon the appeal (2):—"In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present". An earlier case of *Turner* v. *Cuxon* (3) dealt with a voluntary payment to which the second part of these observations would apply. Subsequent cases which provide examples of payments of the same kind are *Cowan* v. *Seymour* (4); *Seymour* v. *Reed* (5); and *Corbett* v. *Duff* (6). In my opinion the £104 could be classed with payments of the kind which Lord *Loreburn* said were not taxable. However, decisions upon the English Act need to be used with care in interpreting the present Act. I refer to them only because they were used to support the commissioner's contention that the £104 was assessable income.

Stedeford v. *Beloe* (7) is another case in which the taxpayer succeeded. There the question was whether an annual pension granted out of the school funds to a headmaster on his retirement was taxable. The governing body of the school which granted the pension had the right at any time to rescind it and to cease making payments to the headmaster. Viscount *Dunedin* said:—"It (the pension) is not given to him in respect of his office as headmaster, because he no longer holds that office of headmaster. It is only given to him because he is no longer headmaster. . . . Now it must be a real profit under Schedule D, and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is

(1) (1907) 2 K.B. 688.
(2) (1909) A.C. 104, at p. 107.
(3) (1888) 22 Q.B.D. 150.
(4) (1920) 1 K.B. 500.
(5) (1927) A.C. 554.
(6) (1941) 1 K.B. 730
(7) (1932) A.C. 388.

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merely a casual payment which depends upon somebody else's good will" (1). Lord *Warrington of Clyffe* said: "Here each payment is wholly voluntary. The case is only an instance of a succession of voluntary payments, each of which is voluntary and none of which need necessarily be continued" (2). Lord *Thankerton* adopted this quotation to describe the pension (2). "It was a mere donation given each year with no certioration that it would be repeated the year following". Lord *Macmillan* concurred. The sum of £104 resembles the headmaster's pension in these respects. It was a succession of voluntary payments: it had the quality of periodicity: it became payable when the respondent left the civil employment: it was in the absolute discretion of the firm whether it would carry out the scheme: it was not bound to make any payment to the respondent. Lord *Phillimore* said in delivering judgment in *Seymour* v. *Reed* (3):—"My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Sch. E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service". The authorities in question were in the line of cases upon which the commissioner relied. The judgment in the case of *Stedeford* v. *Beloe* (4) shows that Lord *Phillimore's* observations could be extended to a succession of mere voluntary payments.

The case for the inclusion of the sum of £104 is no stronger because its measure was the difference between the military and civil pay. If the measure were different, more or less—that circumstance could not have distinguished any greater or smaller sum, for the purposes in hand, from the present sum of £104.

In my opinion, as already stated, the question should be answered in the negative.

WEBB J. As I view the evidence the moneys sought to be taxed were paid to the taxpayer because of, and as a reward for, his enlistment and for no other purpose. This fact remains, although the taxpayer when he enlisted was in the employ of the company that paid him the reward, and he qualified for the reward because he was its employee; and although the reward was conditional upon the military pay of the employee being less than his pay as the company's employee, and was limited to the amount of the

(1) (1932) A.C., at p. 390.
(2) (1932) A.C., at p. 391.
(3) (1927) A.C., at p. 571.
(4) (1932) A.C. 388.

difference. The commissioner in claiming that the reward is taxable overlooks the essential nature of the reward as one solely for enlistment and concentrates on the limitation of the reward to particular recipients, being employees of the company, and its quantification with regard to the difference in their military and civil pay. But the essential nature of the reward as one solely for enlistment remains, notwithstanding this limitation and quantification. It is true that the quantification made the reward the equivalent of the loss of pay as a result of enlistment; but on the other hand the amount of the reward bore no relation to length of service with the company: a soldier who had long been employed by the company but with short military service might receive a mere fraction of the reward paid to a soldier employed by the company for a brief period but with long military service.

The quality of the reward is not determined by the yardstick used to quantify it.

The purpose of the payment by the company, as I see it, was to encourage enlistments among its employees, but its motive may have been to induce them to return to their employment with the company after discharge from the forces; many would, no doubt, have enlisted in any event. However, the purpose of, and not the motive for, the payment is the test of its nature.

In my opinion the reward was not given or received "in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by" the taxpayer, and so does not come within s. 26 (*e*) of the *Income Tax Assessment Act* 1936-1943.

I would answer the question in the negative.

FULLAGAR J. I have not regarded this case as by any means free from difficulty, but two things seem to me to be clear. The first is that neither the provisions of s. 118A of the *Defence Act* 1903-1941 nor those of the *National Security* (*Reinstatement in Civil Employment*) *Regulations* 1939-1944 have any bearing on the question raised. The character of the receipts in question cannot depend on enactments creating special rights and duties for a limited purpose between employers and employees. The second thing which seems to me to be clear is that the receipts in question are not so related to any employment of the respondent as to fall either within the terms of the definition of "income from personal exertion" in s. 6 of the *Income Tax Assessment Act* 1936-1943 or within the terms of s. 26 (*e*) of that Act. The moneys would not, of course, have been paid if the respondent

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had not been employed by Macdonald, Hamilton & Co. up to the date of his enlistment. But nothing that he had done in his employment by Macdonald, Hamilton & Co., or might thereafter do if he re-entered their employment, provided the occasion of the payments. The payments were made irrespective of any services given by an employee as employee. The same bounty was available to one who had served for one month or for ten years. The whole substance of the matter is accurately stated by *Fair* J. in *Louisson* v. *Commissioner of Taxes* (1), where his Honour speaks of such moneys as " given out of a sense of appreciation of sacrifices made on the enlistment of employees . . . and as a recognition of their public spirit in doing so ". The fact of the respondent's employment explains the selection of him as a recipient, but it in no degree characterizes the payment. The payment does not partake in any degree of the character of a reward for services rendered or to be rendered.

I understood Mr. *Wallace* to contend that the conclusion expressed above must be the end of the matter, and that, if the receipts in question could not be brought within the definition of " income from personal exertion " in s. 6 or within s. 26 (*e*), they could not be treated as assessable income under the Act. This argument is not without an appearance of logic, but, in my opinion, it cannot be accepted. The truth is that, in spite of its form, it is impossible to regard the definition in s. 6 as exhaustive. It is only necessary to look at s. 26 to see that this is impossible. Section 26 brings into charge—notably in par. (*e*) and in pars. (*f*) and (*h*)—receipts which would never be treated otherwise than as income from personal exertion, and which are yet outside the scope of the actual words of the definition. And s. 26 uses the word " include ". And s. 25, which works together with ss. 17 and 48 to provide the fundamental basis of taxation, provides that the assessable income of a taxpayer shall be his gross income from the respective sources described. Whatever is " income " is thus brought into charge unless some special provision can be found which keeps it out. In *Scott* v. *Commissioner of Taxation* (*N.S.W.*) (2) *Jordan* C.J., dealing with an Act which was the same in relevant respects as the Act now under consideration, said :—" The definition section, where it deals with income, does not define it, because the word ' income ' appears on both sides of the equation. Nor does it define ' income from personal exertion'. It merely enumerates, by way of illustration,

(1) (1942) N.Z.L.R. 30, at p. 34.

(2) (1935) 35 S.R. (N.S.W.) 215 ; 52 W.N. 44.

various forms of income which are to be treated as derived from personal exertion" (1). A little earlier his Honour had said:—"The word 'income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind" (2). The authority of these passages is not affected by the fact that the position which actually arose in *Scott's Case* (3) is now covered by s. 26 (*d*) of the Commonwealth Act.

For the reasons given, the receipts in question may be assessable income from personal exertion although not comprehended within the terms of the definition in s. 6 or within the terms of s. 26 (*e*). And the conclusion seems to me to be unavoidable that those receipts do constitute assessable income. Before stating reasons for this conclusion, however, it is desirable to refer to two decisions of the Supreme Court of New Zealand, on the latter of which the respondent strongly relied, and to which great weight was naturally given by the Board of Review. One of them has already been incidentally referred to. The circumstances attending the payments in question in those cases seem to have been the same as those attending the payments in question in the case before us. But in one of the New Zealand cases the money was paid (or was treated as having been paid) in a single lump sum, whereas in the other there had been a series of periodical payments. In the present case there is no express statement as to how the moneys were paid, but it seems safe to infer from certain evidence given by the respondent before the Board of Review that payments were made periodically at regular intervals.

The first case is *Louisson* v. *Commissioner of Taxes* (4). The relevant statutory provisions were contained in s. 79 (1) (*b*) and (*h*) of the *Land and Income Tax Act* 1923-1939 (N.Z.). The section provided that the assessable income of any person should be deemed to include all sums received or receivable by way of emolument of any kind in respect of or in relation to the employment or service of the taxpayer: (*h*) income derived from any other source whatsoever. Paragraph (*b*) may be regarded as corresponding to s. 26 (*e*) of the Australian Act, and par. (*h*) to s. 25. The New Zealand taxation year ended on 31st March. On 1st October 1939 the

(1) (1935) 35 S.R. (N.S.W.), at p. 220; 52 W.N. 44.
(2) (1935) 35 S.R. (N.S.W.), at p. 219; 52 W.N. 44.
(3) (1935) 35 S.R. (N.S.W.) 215; 52 W.N. 44.
(4) (1942) N.Z.L.R. 30.

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appellant taxpayer enlisted in the armed forces of New Zealand, and on the same date the directors of the company which employed him passed a resolution that, in the case of members of the staff enlisting, the difference between their pay as employees and their military pay would be paid by the company up to 31st March 1940, the position to be further reviewed after that date. In pursuance of that resolution a sum of £453 was paid to the appellant. *Fair* J. held, in the first place, that the money was not received in respect of or in relation to the employment of the appellant by the company, and the passage quoted above occurs in that part of his judgment which deals with this question. His Honour then proceeds to consider whether the receipt constituted "income" within the meaning of par. (*h*) of s. 79 (1). This question also he answers in the negative. He treats the sum of £453 as having been received in a lump sum, and it is clear, I think, that this forms the whole basis of his decision. He says: "Income has a meaning that is well established by the cases as something which usually involves periodical payments" (1). He concedes that a payment of a single sum *may* constitute income, but thinks that the payment in this case, despite the method of its computation, does not. "It may", he says, "be regarded as a grant to cover the transition period from civil to military life" (2).

It is clear that the decision of *Fair* J. is distinguishable from the present case. But on 23rd July 1940 the directors of the same company passed another resolution to the effect that, in the case of members of the staff enlisting, the company would, from 31st March 1940 to 30th September 1940, pay to them the difference between their pay as employees and their military pay. On 2nd October 1940 it was resolved that the same thing be done for the period from 30th September 1940 to 31st March 1941. During the income year ended 31st March 1941 Mr. Louisson received from the company in pursuance of the resolutions a total sum of £612, which was paid to him *by equal monthly payments*. The commissioner again treated this sum as income, and Mr. Louisson again appealed. The matter came, on case stated, before the Court of Appeal consisting of *Myers* C.J., *Blair* J., *Kennedy* J. and *Northcroft* J.—*Louisson* v. *Commissioner of Taxes* (3). The decision of the Court in favour of the appellant was unanimous. They rejected a contention (which had not been developed in the earlier case before *Fair* J.) that the sums in question had been

(1) (1942) N.Z.L.R., at p. 35.
(2) (1942) N.Z.L.R., at p. 36.
(3) (1943) N.Z.L.R. 1.