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[HIGH COURT OF AUSTRALIA.]

NETTE

APPELLANT ;

APPLICANT,

AND

HOWARTH

RESPONDENT.

RESPONDENT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

Bankruptcy—State public servant—Resignation from service—Superannuation fund
—Contributions by bankrupt—Refund in lump sum—Capital receipt—Income—
Property divisible amongst creditors—Protection by State statute—Superannuation
Act 1916-1930 (N.S.W.) (No. 28 of 1916 — No. 31 of 1930), secs. 38, 88*—
Bankruptcy Act 1924-1933 (No. 37 of 1924 — No. 66 of 1933), secs. 4, 6,
60 (1), 91 (i) 101*.

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SYDNEY,
March 29 ;
April 1.

Upon his retirement from the State public service after the sequestration
of his estate, a bankrupt became entitled, under sec. 38 of the *Superannuation
Act 1916-1930* (N.S.W.), to a lump sum equal to the contributions paid by him
under that Act. An application by the official receiver for an order that this
sum be paid to him was dismissed by the Court of Bankruptcy, and he
appealed to the High Court.

MELBOURNE,
April 30.
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

*The *Bankruptcy Act 1924-1933* provides:—By sec. 4: "In this Act, unless the contrary intention appears—
. . . 'Property' includes money, goods, things in action, land, and every description of property, whether real or personal . . . ; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined." By sec. 6: "This Act shall not affect (a) any provision in any State Bankruptcy or Insolvency Act relating to matters not dealt with,

either expressly or by necessary implication, in this Act." By sec. 60: "(1) Upon sequestration the property of the bankrupt shall vest in the official receiver named in the order, and shall be divisible among the creditors of the bankrupt in accordance with the provisions of this Act." By sec. 91: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as 'the property of the bankrupt,' shall . . . include—(i) all property which belongs to or is vested in the bankrupt at the commencement of bankruptcy, or is

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Held that the appeal should be allowed :—

By *Rich, Starke and Dixon JJ.*, on the ground that the sum did not come within any of the descriptive words in sec. 101 of the *Bankruptcy Act* 1924-1933, but was a capital receipt which vested in the official receiver.

By *Evatt and McTiernan JJ.*, on the ground that the sum was "income" within the meaning of that word in sec. 101 of the *Bankruptcy Act*, and was not excluded from the operation of that section by the proviso to the section.

Decision of the Court of Bankruptcy: *Re Howarth; Ex parte Official Receiver*, (1934) 8 A.B.C. 16, reversed.

APPEAL from the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

Walter Thomas Howarth entered the public service of New South Wales in 1914. During the term of his service he made, in the manner prescribed by sec. 20 of the *Superannuation Act* 1916-1930 (N.S.W.), the required contributions to the State Provident Fund established by sec. 4 of that Act. His estate was sequestrated on 10th July 1934. In August 1934 Howarth resigned from the public service, and there became payable to him under sec. 38 of the *Superannuation Act* a lump sum of £256 17s. 1d., the amount of his contributions to the State Provident Fund. The State Superannuation Board was requested by Percy William Nette, the official receiver, to pay this sum to him as the trustee of the bankrupt's estate. Upon the Board's suggestion the trustee applied, under sec. 25 and/or sec. 101 of the *Bankruptcy Act* 1924-1933, to the Court of Bankruptcy for an order for the payment of the sum in question

acquired by or devolves on him before his discharge." By sec. 101: "Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs: Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged."

* The *Superannuation Act* 1916-1930 (N.S.W.) provides:—By sec. 38:—“(1) Where a contributor resigns or is dismissed or discharged from the service of an employer, there shall be paid to such contributor a lump sum

equal to the contributions paid by him under this Act (but without interest), irrespective of the cause of such resignation, dismissal, or discharge. (2) Where any employee who has been discharged or dismissed, or who has resigned, and has received a refund of the amount of his contributions, thereafter enters the service of an employer, he shall not be entitled to claim any further benefit in respect of his previous service." By sec. 88: "Pensions and other benefits under this Act shall not be in any way assigned or charged or passed by operation of law to any person other than the pensioner or beneficiary, and any moneys payable out of the Fund on the death of an employee or beneficiary shall not be assets for the payment of his debts or liabilities."

to him for distribution amongst the bankrupt's creditors in accordance with the provisions of the Act. The application was dismissed: *Re Howarth; Ex parte Official Receiver* (1).

From that decision the official receiver now appealed to the High Court.

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Moverley, for the appellant. The money payable to the respondent pursuant to sec. 38 (1) of the *Superannuation Act* 1916-1930 (N.S.W.) is property which was acquired by him after the commencement of his bankruptcy and before his discharge within the meaning of sec. 91 (i) of the *Bankruptcy Act* 1924-1933, and, therefore, vests in the appellant as official receiver. The respondent has, under the *Superannuation Act*, a legal right to the money; therefore the questions which arose in *Ex parte Wicks; In re Wicks* (2) do not arise here. The money does not come within the scope of any of the descriptive words in sec. 101 of the *Bankruptcy Act*. Even if it does, the whole or some part of it should be made available for distribution amongst the respondent's creditors (*Ex parte Huggins; In re Huggins* (3)). The payments made from time to time by or on behalf of the respondent to the State Provident Fund created pursuant to the *Superannuation Act*, were contributions made by him to that fund; they cannot be regarded merely as deductions from his remuneration. The money payable to the respondent is neither "pay," nor "pension," nor "salary," nor "wages" within the meaning of those words in the proviso to sec. 101 (*Stuart-Robertson v. Lloyd* (4)); it is merely a refund to a contributor of a sum of money equal in amount to the amount of the contributions made by him. "Pay," "pension," "salary" and "wages" take the form of periodical payments. It is that type of payment which the Legislature seeks to protect, that is, in effect, allowances for subsistence. Here the money is payable in a lump sum, perhaps in the nature of an emolument, and is attachable (*Crowe v. Price* (5)). For the meaning of "emolument," see *R. v. Postmaster-General* (6). What constitutes "income" and "salary" was dealt with in

(1) (1934) 8 A.B.C. 16.

(2) (1881) 17 Ch. D. 70.

(3) (1882) 21 Ch. D. 85.

(4) (1932) 47 C.L.R. 482, at p. 487.

(5) (1889) 22 Q.B.D. 429.

(6) (1878) 3 Q.B.D. 428.

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O'Sullivan (with him *Hidden*), for the respondent. The money is a benefit (sec. 38 (2), *Superannuation Act*), and, notwithstanding that it is payable in a lump sum, falls within the precise meaning of the words "pay" and "pension" in the proviso to sec. 101 of the *Bankruptcy Act*. Even if the money is not protected by the proviso, it comes within the scope of sec. 101 (*In re Garrett* (2)). Had the English *Bankruptcy Act* 1914 contained a provision similar to the proviso to sec. 101, neither of the items under consideration in *In re Garrett* (2) would have been attachable. If the money is outside the scope of sec. 101, then it does not, either under sec. 60 or sec. 91 of the *Bankruptcy Act*, vest in the official receiver. This is the type of case which the Legislature intended to protect by the proviso to sec. 101. A gratuity payable in a lump sum under the *War Gratuity Act* 1920 is an apt illustration of "pay" intended to be protected by the proviso. The word "pay" in juxtaposition to the word "pension" means pay of the same nature as a pension. The money is payable out of a fund essentially created for pension purposes, and is impressed with that character. This is a matter which has not been "dealt with, either expressly or by necessary implication" within the meaning of sec. 6 of the *Bankruptcy Act* 1924-1933, and therefore the protection afforded by sec. 88 of the *Superannuation Act* 1916-1930, in conjunction with the *Bankruptcy Act* 1898 (N.S.W.), remains unaffected. Having regard to the matters contemplated by the proviso it should be construed liberally (*Stuart-Robertson v. Lloyd* (3)).

Moverley, in reply. The money should be regarded as a realization of property as defined in sec. 4 of the *Bankruptcy Act*.

Cur. adv. vult.

(1) (1892) 1 Q.B. 522, at p. 531.

(2) (1930) 2 Ch. 137.

(3) (1932) 47 C.L.R., at p. 489.

The following written judgments were delivered :—

RICH J. The bankrupt whose estate was sequestrated on 10th July 1934 was in the public service of New South Wales. During the term of his service he made the required contributions to the State Provident Fund under sec. 4 of the *Superannuation Act* 1916. Upon his resignation from the service on 28th August 1934 there was payable to him under sec. 38 (1) of the Act a lump sum equal to the contributions paid by him to the fund. The official receiver of the bankrupt's estate requested the State Superannuation Board to pay this sum to him in his capacity as trustee of the bankrupt's estate. Upon the Board's suggestion the trustee applied to the Bankruptcy Court for an order for payment of the sum in question to him for distribution in accordance with the provisions of the *Bankruptcy Act*. The learned Judge of the Bankruptcy Court dismissed the application, being of opinion that the money fell within the relative words "pay" &c. used in sec. 101 of the *Bankruptcy Act* and in its proviso. Unless excluded by other provisions of the Act, this sum is property which vests in the official receiver, and is divisible amongst the creditors of the bankrupt in accordance with the provisions of the Act, secs. 4 ("property"), 60, sub-sec. 1 and 91 (i). It was contended on behalf of the bankrupt that the sum in question is protected by the proviso to sec. 101 of the *Bankruptcy Act*. That section reads:—"Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs: Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged." Before interpreting these words it is necessary to consider the character of the money in question. Its character is stamped on it by the Act. It is a lump sum which the Superannuation Board is bound by statute to pay. It is not a payment in respect of past or current services. It is not periodic. On the other hand the words in the proviso have a common characteristic—they are periodic. "Pay" is a word of general import (*Upperton v. Ridley* (1)). It is used with reference to certain classes of employment,

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such as soldiers, sailors and police (*Goodwin v. Sheffield Corporation* (1)). "Pension" is in the nature of deferred pay, and usually given upon retirement for past services. Salary and wages are recompense periodically paid in respect of work or labour in another man's business. "'Salary,' I think, must mean a definite payment for personal services arising under some contract, and (to borrow an expression of my brother *Fry*) computed by time" (*In re Shine; Ex parte Shine* (2)). "Wages" may be classified under the same genus. The sum in question is not computed with reference to recurrent events. It is a statutory refund paid on the happening of a given event, and made up of the contributions paid by the officer under the Act. In my opinion, it does not fall within the words of the proviso. The words of the proviso do not cover as large an area as the principal part of the enactment contained in the section.

We have already held that the difference in the enumeration in the two parts of the proviso is intentional, and not merely due to a compendiousness of expression in the proviso (see *Stuart-Robertson v. Lloyd* (3)).

The additional words contained in the main provision are "emoluments," "profits," "earnings" and "income." If the sum payable out of the Provident Fund to the bankrupt on his retirement fell within the meaning of any of these expressions, it would be within the discretion of the Court to say how much should be received by the Official Receiver as trustee of his estate. The whole sum would not pass *ipso jure* as property.

But, in my opinion, it cannot be brought within any of those expressions. They all relate to receipts of a revenue or income nature. "Emoluments" are the advantages in money or money's-worth which flow from occupation of an office or the like. "Earnings" are the rewards of exertion. "Profits" arise from the conduct of a business or undertaking of some kind or from commercial transactions. "Income" is a wide word, but it is incapable of including any receipt of a capital nature.

(1) (1902) 1 K.B. 629.

(2) (1892) 1 Q.B., at p. 529.

(3) (1932) 47 C.L.R. 482.

The lump sum, however, is a payment made once for all. It discharges the retiring officer's claim upon the fund. Its nearest analogy is the refund of premiums, or the cancellation of a life or endowment policy, or the payment of its surrender value.

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I think the decision of His Honor Judge *Lukin* was wrong, and that the appeal should be allowed.

STARKE J. Under the *Superannuation Act* 1916 of New South Wales (1916, No. 28) provision is made for contribution by persons employed by the Government of New South Wales, and various other State authorities, to a State Provident Fund, and for pensions or benefits out of that fund to contributors. But it is provided by sec. 38 of the Act that where a contributor resigns or is dismissed or discharged from his service, there shall be paid to such contributor a lump sum equal to the contributions paid by him under the Act (but without interest) irrespective of the cause of such resignation, dismissal or discharge. And sec. 88 enacts that pensions and other benefits under the Act shall not be in any way assigned or charged or passed by operation of law to any person other than the pensioner or beneficiary.

Walter Thomas Howarth entered the public service of New South Wales in February 1914, and became a contributor to the State Provident Fund already mentioned. In August 1934 he resigned from the service, and there became payable to him under sec. 38 of the *Superannuation Act* a lump sum of £256 17s. 1d., equal to his contribution to the fund. On 10th July 1934 a sequestration order had been made against Howarth pursuant to the provisions of the Federal *Bankruptcy Act* 1924-1933, and he thereby became bankrupt. The Official Receiver of the property of the bankrupt applied to the Court of Bankruptcy for an order that the sum of £256 17s. 1d. already mentioned be paid to him for distribution in accordance with the *Bankruptcy Act* or for such other order as the Court deemed fit. The application was dismissed, and from that decision an appeal is now brought to this Court.

Prima facie, the sum mentioned passes to the Official Receiver by force of the *Bankruptcy Act* (secs. 4, 60, 91). It does not represent the personal earnings of the bankrupt or any return of those earnings

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to him. (Cf. *In re Roberts* (1); *Shoolbred v. Roberts* (2).) It is a sum payable to him under and by virtue of the provision contained in sec. 38 of the *Superannuation Act*. The *Federal Bankruptcy Act* prevails over the provisions of sec. 38 of the *Superannuation Act* (Constitution, sec. 109). But the provisions of sec. 101 of the *Bankruptcy Act* itself are relied upon: "Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs: Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged." The proviso points to payments for services rendered, present or past (*In re Shine*; *Ex parte Shine* (3); *Stuart-Robertson v. Lloyd* (4)). The moneys payable to the bankrupt under sec. 38 of the *Superannuation Act* do not correspond to this test, and consequently fall outside the proviso. The positive enactment of sec. 101 is, however, wider than the proviso; it includes pay, pension, salary, emoluments, profits, wages, earnings or income. But wide as are these words, they relate only to emoluments, earnings or income in the nature of personal earnings of the bankrupt—the results of his personal and daily labour—and cannot be extended, e.g., to the profits of a trade or business carried on by him (*In re Dowling*; *Ex parte Banks* (5); *Emden v. Carte* (6); *In re Rogers*; *Ex parte Collins* (7); *In re Graydon*; *Ex parte Official Receiver* (8); *In re Garrett* (9)). The moneys claimed in this case are not in any sense personal earnings of the bankrupt, and do not, therefore, fall within the positive enactment of sec. 101.

The appeal should be allowed, and an order made declaring the right of the Official Receiver of the bankrupt to the moneys claimed.

DIXON J. Sec. 5 (3) of the *Bankruptcy Act* 1924-1933 enacts that, except as otherwise expressly provided in that Act, its provisions relating among other matters to the remedies against the property

(1) (1900) 1 Q.B. 122.

(2) (1900) 2 Q.B. 497.

(3) (1892) 1 Q.B. 522.

(4) (1932) 47 C.L.R., at p. 489.

(5) (1877) 4 Ch. D. 689.

(6) (1881) 17 Ch. D. 768.

(7) (1894) 1 Q.B. 425.

(8) (1896) 1 Q.B. 417.

(9) (1930) 2 Ch. 137.

of a debtor shall bind the Crown as representing the Commonwealth or any State.

Sec. 88 of the *Superannuation Act* 1916 of the State of New South Wales provides that benefits under that Act shall not pass by operation of law to any person other than the beneficiary. Benefits which would, apart from the section, pass under the provisions of the *Bankruptcy Act* to the Official Receiver of the estate of a bankrupt beneficiary will do so notwithstanding an enactment of a State law to the contrary.

Sec. 109 of the Constitution gives paramountcy to the Federal statute, and, according to the express provision contained in sec. 5 (3), the Federal statute intends to bind the State in reference to such a matter.

The *Superannuation Act* 1922 of the Commonwealth contains in sec. 80 a provision similar to sec. 88 of the State enactment, but as it is legislation by the same Parliament any seeming repugnance between it and the *Bankruptcy Act* must be dealt with under the rule of construction, *generalia specialibus non derogant*, and, in the unlikely event of that rule being held inapplicable, under the rule of law, *leges posteriores priores contrarias arrogant*. This difference in the treatment of the same provision when it occurs in a State and a Federal enactment may be a necessary result of federalism, but it produces an anomaly. For it would appear that while benefits arising under the State Act are not, those arising under the Federal Act probably are, protected from the consequences of bankruptcy.

In the present case the bankrupt, who was in the public service of the State, resigned. His resignation took effect from a date shortly after sequestration. He had been a contributor to the State Provident Fund, and upon his resignation he became entitled, subject to this bankruptcy, to receive payment of a lump sum equal to the contributions paid by him under the Act (sec. 38 of the *Superannuation Act* 1916 (N.S.W.)). The question is whether the Official Receiver can intervene and obtain this sum for the creditors.

Prima facie he can, because the bankrupt's right to receive the sum is property, and if it did not belong to him and was not vested in him at the commencement of the bankruptcy, it has been acquired

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by him or has devolved on him before his discharge. (See *Bankruptcy Act* 1924-1933, sec. 91 (i), sec. 60 (1), and sec. 4, definition of "Property.") But sec. 101 provides that, subject to the Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs. By a proviso, the section is not to apply to any pay, pension, salary, or wages which by any Commonwealth Act or State Act is made exempt from attachment or incapable of being assigned or charged. The lump sum payable to a contributor on his retirement is by the State Act made incapable of being assigned or charged.

The learned Judge of the Federal Court of Bankruptcy has held that the lump sum payable to the bankrupt fell within the description of receipts contained in the main clause of the section and also within the description of the proviso, descriptions which this Court has held not to be co-extensive (*Stuart-Robertson v. Lloyd* (1)).

Treating sec. 101 as a special provision excluding from the subject matter with which it deals the operation of the general provisions which otherwise might apply, his Honor held that the sum did not pass to the Official Receiver, a consequence produced by an intention discoverable in the proviso. This view depends initially upon the interpretation attached to the description of receipts contained in the main clause of sec. 101. Upon consideration I am of opinion that the sum payable upon the bankrupt's resignation does not fall within any part of that description. The governing words of sec. 101 are "is in receipt of." Whilst these words do not connote necessarily a regular periodicity, they do suggest recurrence as an actual or expected characteristic of the things the section proceeds to describe. They raise a presumption that they will be of a revenue nature. The lump sum payable to a contributor on his retirement is to be equal to his contributions, and those contributions were deducted from his salary. But the contributions ceased to be salary when they were made to the fund. The lump sum cannot be considered deferred salary or pay. It may be regarded as a refund perhaps, but, even so, the money refunded is received not

as remuneration, but as a lump sum payable on a contingency. If it is a refund, at least it is a fund. In the receipts enumerated in sec. 101 the words "pay," "salary" and "wages" refer to remuneration earned by present service. "Pension" refers predominantly to payments which follow service. The time has passed when the idiomatic use of the word extended to non-recurring payments. But it may perhaps include in this section a succession of payments which are not the consequence of past service or the like. "Emolument" too is a word which has ceased to bear its original meaning of mere gain, profit, or advantage. It too relates to revenue, whether casual or constant, arising from an office, station, or situation. "Profits," "earnings" and "income" are wide words. They cover the fruits of labour and much more besides. For example, "income" in the analogous sec. 51 (2) of the English *Bankruptcy Act* 1914 includes maintenance payable under an order in divorce (*In re Landau; Ex parte Trustee* (1)). Decisions interpreting expressions reproduced in the Australian section which occur in sec. 51 and corresponding previous British enactments will be found in that case (1) and in *Hollinshead v. Hazleton* (2). But the English and Australian provisions alike appear to be directed at revenue receipts. Indeed, they are reminiscent of the rule long established in bankruptcy, that the personal earnings of a bankrupt do not pass to his trustee except to the extent that they are not required for the support of himself and his family.

The words of sec. 101 refer to the character in which money is paid or received. The character in which an accumulated fund is received is not determined by the source of the accumulations. The sum now in question is not in truth even an accumulation of income, salary or the like. It is a sum payable pursuant to statute, which is ascertained by a calculation of the amount contributed in the past from income by deductions from salary. It comes into the hands of the retiring contributor simply as money. It is, as it appears to me, a capital receipt.

In my opinion the appeal should be allowed. A declaration should be made that the lump sum payable to the bankrupt under the *Superannuation Act* 1916 (N.S.W.) vests in the official receiver,

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(1) (1934) Ch. 549.

(2) (1916) 1 A.C. 428.

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and is payable to him by the State Superannuation Board. With that declaration the matter should be remitted to the Federal Court of Bankruptcy to be dealt with according to law. I would make the costs of the appeal costs in the cause, so that the Court of Bankruptcy can make such order as to how they shall be borne as appears to it to be just.

EVATT AND McTIERNAN JJ. The first question for decision is whether a sum of money which is payable to the bankrupt under sec. 38 (1) of the *Superannuation Act* 1916-1930 of New South Wales is "pay, pension, salary, or wages" under the proviso to sec. 101 of the *Bankruptcy Act*. The moneys as to which the question arises are a lump sum equal to the amount deducted by the Crown from the salary of the bankrupt under sec. 20 of the *Superannuation Act* of the State, and paid by it as his contribution to the fund established by the Act to provide pensions on retirement, and other benefits to contributors who cease to be members of the public service. Contributions are made to the fund by the Crown as well as by employees. Sec. 38 (1) is in these terms:

"Where a contributor resigns or is dismissed or discharged from the service of an employer, there shall be paid to such contributor a lump sum equal to the contributions paid by him under this Act (but without interest), irrespective of the cause of such resignation, dismissal, or discharge."

The category in the proviso to sec. 101 is more limited than that in the principal part of the section. The word "pay" includes the remuneration granted to the holder of a rank or office in the case where he is relieved from the actual performance of the duties of the office. In this sense it includes the half-pay of a military officer. A characteristic of a payment which answers the description "pay" is that the payee receives it on account of the occupancy of some office, rank or employment. The payment to which the bankrupt is entitled lacks this characteristic. His title to it accrues upon his resignation from office. As distinguished from "pay" the word "pension" describes a payment to a person who has retired, in consideration of past services. While this may not be an exhaustive definition, it is impossible to say that the refund of the bankrupt's contribution, which is made because he does not become entitled to a pension under the *Superannuation Act*, is a pension.

Nor is the lump sum now in question "salary" or "wages." It is true that it is made up from deductions from his salary. But these payments are compulsory contributions made by him out of his salary. He is not entitled to receive the moneys so paid from the Crown as arrears of salary due and payable for his services. These moneys having become by force of the statute his contributions to the superannuation funds, he is entitled to a refund of them in their character as contributions. It follows that the lump sum to which the bankrupt is entitled is not "pay," "pension," "salary" or "wages" within the proviso.

The next question is whether this payment is within the wider category in the principal part of the section. Although it is a single lump payment, it would not be novel to regard it as within the category of payments which devolve upon the official receiver, subject to a proviso similar to sec. 101. (Cf. *In re Lupton*; *Ex parte Official Receiver* (1).) The category in the principal part of sec. 101 is "pay, pension, salary, emoluments, profits, wages, earnings, or income." The payment now in question, having the characteristic of a reimbursement or refund of the bankrupt's contributions to the State Provident Fund, established under the *Superannuation Act* of the State, cannot be regarded as pay, pension, salary, emoluments, profits, wages, or earnings. But we think it is "income" within the meaning which that word bears in sec. 101. (Cf. *Stuart-Robertson v. Lloyd* (2).)

We are not satisfied that the word "income" is there used as the antithesis of capital receipts. In any event, the money is not paid in consideration of the bankrupt's retirement from office. It is not arrived at by capitalizing income. It was deducted from his salary for the purpose of being applied towards providing a pension, and, this purpose having failed, it is restored to him. But it is not a capitalization of arrears of salary. It is the bare equivalent of the total deductions made from his salary. It is a return to him by one payment of income which he earned but did not enjoy.

We agree with the decision of Judge *Lukin* that this payment is one of the benefits which the State Parliament intended to protect by sec. 88 of the *Superannuation Act* 1916. That section is in these terms :

"Pensions and other benefits under this Act shall not be in any way assigned or charged or passed by operation of law to any person other than the pensioner

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(1) (1912) 1 K.B. 107.

(2) (1932) 47 C.L.R., at pp. 487, 489, 494.

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or beneficiary, and any moneys payable out of the Fund on the death of an employee or beneficiary shall not be assets for the payment of his debts or liabilities."

But, in the view that the benefit payable to the bankrupt is "income" within the intendment of sec. 101 of the *Bankruptcy Act*, a conflict arises between that section and sec. 88 of the *Superannuation Act* 1916 of the State. Sec. 101 is a valid enactment with respect to bankruptcy, and its provisions must prevail. But the provisions of the statute are material matters for the consideration of the Court of Bankruptcy in deciding how much of the benefit to which the bankrupt is entitled should be ordered to be distributed amongst his creditors.

In our opinion, the appeal should be allowed and the matter remitted to the Court of Bankruptcy, so that it may act in accordance with the provisions of sec. 101.

Appeal allowed. Declare that the lump sum payable to the bankrupt under the Superannuation Act 1916 (N.S.W.), vests in the official receiver and is payable to him by the State Superannuation Board. Remit matter to the Federal Court of Bankruptcy to be dealt with according to law. Costs of the appeal costs in the matter.

Solicitors for the appellant, *Clive Clarke & Co.*

Solicitor for the respondent, *V. M. Pike.*

J. B.