and Lenasia Extension no. 1, which form made it clear that the townships were regarded as one, this last requirement has also, in my view, been satisfied. I have come to the conclusion that the circumstances show that a contract for the benefit of third parties, the other lotholders in both Lenasia and Lenasia Extension no. 1, was entered into by the applicants as purchasers of the relevant lots.

Mr. *Coetzee*, for objectors Pochee and Tayob, addressed a very interesting argument to me on the impact which legislation on town planning made upon the common law position. In view of my conclusion stated above, it is, however, not necessary for me to consider this argument.

There remain a few loose ends which I have to gather. Mr. *Nathan* has argued that Pochee and Tayob have placed nothing before the Court which could be said to be a valid ground of objection. They merely say that they are lotholders and that they object. He contended that each objector has to tell the Court in what manner his interests will be detrimentally affected by the deletion of conditions. If he does not do so, his objection must be regarded as frivolous and should not be considered at all. If I were to uphold that argument it may affect the question of costs but will not affect the merits because I have already held that, in view of Omar Joosub's opposition, the applicants must fail. The contention is, however, in my view, unsound. I think both Mr. *Rathouse* and Mr. *Coetzee* are right in submitting that, provided the conditions of title amounted to a *stipulatio alteri*, any objection ends the matter, save, perhaps, in certain exceptional circumstances which may form the basis for a declaration by the Court that the servitude has been cancelled or has ceased to exist. *Ex parte Johannesburg Diocesan Trustees*, 1936 T.P.D. 21 at pp. 26-28.

Mr. *Nathan* has attempted to argue the point made in the petition that the relevant title conditions created a nude prohibition by contending that it creates an illusory benefit which is tantamount to no benefit at all. I must confess that I do not appreciate this argument. The point made in the petition that the condition sought to be deleted is a stereotyped form of restriction which appears to have been commonly inserted in conditions of establishment at the time when Lenasia was established without regard as to whether or not it was intended to operate in the interests or for the benefit of any person or body of persons, is in any event unfounded. I agree with Mr. *Rathouse* that the more common a restriction the more it is found to serve a useful purpose. The restriction in question is not anomalous at all. The intention was clearly to make provision there only for a certain type of business which would not affect the quietness of the neighbourhood. The township owner endeavoured, it is clear, to keep unnecessary noise out as far as possible in its general object to create a co-ordinated and harmonious lay-out in the interests of all lotholders.

In the result the application is dismissed with costs; these costs to include the fees of two counsel in respect of both groups of objectors.

Applicants' Attorneys: *Greenfield and Greenfield.* Attorneys for certain Respondents: *S. J. Geffen and Belnick.* Attorneys for other Respondents: *Pencharz, Pencharz & Morgan.*

SECRETARY FOR INLAND REVENUE v. WATERMEYER.

(APPELLATE DIVISION.)

1965. *August* 27, *September* 14. STEYN, C.J., BEYERS, J.A., BOTHA, J.A., HOLMES, J.A., and TROLLIP, A.J.A.

Revenue.—Income tax.—Annuity.—Feature of.—Amount paid yearly at will and voluntarily.—No right of recurrence attached to such payments.—Not an annuity.—Receipts thereof of a capital nature.

De facto recurrent payments, if voluntary and payable at will, do not qualify as annuities.

The taxpayer had received from her husband's former employers an amount of R300 year by year, which amount was paid voluntarily and at the will of the employer. There was no right of recurrence attached to these payments. In an appeal from a decision of the Special Income Tax Court that the amount was not taxable,

Held, that the payments had not been received by "way of an annuity".

Held, further, that the payment of R300 was a right, unattended by any feature associated with income, and was, accordingly, a receipt of a capital nature and in consequence was not taxable. Appeal accordingly dismissed with costs.

Appeal from a decision in the Special Income Tax Court. The facts appear from the judgment of HOLMES, J.A.

W. S. McEwan, for the appellant: *Prima facie* the amount of R300 in question formed part of the taxpayer's gross income for the tax year concerned; see definition of "gross income" in sec. 1 (xi) of Act 58 of 1962. A receipt arising from a voluntary payment is not necessarily a receipt of a capital nature. In the present case the receipt in question is not necessarily a receipt of a capital nature. Where a gift is intended to be of a regular nature and is intended to provide the recipient with an income, in the sense of money, to be used for his maintenance or to supplement his income in that sense, it is to be regarded as income for tax purposes. In *C.I.R.* v. *Lunnon*, 1924 A.D. at p. 98, INNES, C.J., expressly guarded himself against saying that such a gift is of a capital nature; see also I.T. case 60, 2 S.A.T.C. at p. 192; I.T. case 70, 3 S.A.T.C. at pp. 58-9. The submission made above with reference to a gift intended to be of a regular nature, is supported by the majority judgments in *Federal Commissioner of Taxation* v. *Dixon*, 5 A.I.T.R. at pp. 448-9, 456-7. See also Gunn, *Income Tax*, 6th ed., paras. 474, 736; *Moolman* v. *C.I.R.*, 1954 (2) S.A. at p. 568, and cf. *de Villiers* v. *C.I.R.*, 1929 A.D. at pp. 232, 233, and the long line of cases in England referred to in *Lunnon's* case, *supra* at p. 99, and *de Villiers'* case, *supra* at p. 229, e.g. *Blakiston* v. *Cooper*, 1909 A.C. 104; *Chibbett* v. *Joseph Robinson & Sons*, 9 T.C. 48; *Seymour* v. *Reed*, 1927 A.C. 554; *Corbett* v. *Duff*, (1941) 1 K.B. 730; *Calvert* v. *Wainwright*, 1947 K.B. 526; *Bridges* v. *Hewitt*, (1957) 2 All E.R. 281; *Turner* v. *Cuxson*, 2 T.C. 422; *Duncan's Executors* v. *Farmer*, 5 T.C. 417; *Stedeford* v. *Beloe*, 16 T.C. 505. These English cases cannot always be applied directly to situations arising under our statutes because the relevant English statutes taxed profits and gains arising under the cases set out in the schedules thereto. The point at issue in the cases was whether the receipts concerned were taxable (usually under schedules D or E) as being

profits from an office or employment of profit. The test on which they were decided was usually whether the payment was made to the holder of an office or employment as such, that is by way of remuneration for his services, or were mere gifts or presents made on personal grounds and not by way of payment for services; cf. *Seymour* v. *Reed*, 1927 All E.R. Reprint at p. 297. The point that is relevant to the present case is that it was repeatedly emphasised in these cases that the mere fact that the payment was voluntary did not automatically prevent it from being income; see *Seymour's* case, *supra* at p. 300. The English statutes have now been amended in such a way as to bring into the net of taxation cases that were previously decided in favour of the taxpayer; see Halsbury's *Laws of England* (*Simonds* ed.), vol. 20, para. 591 and note (*h*). The fact that a gift is made recurrently, is an important factor suggesting that it is income in the hands of the recipient; see *Lunnon's* case, *supra* at p. 98; *Blakiston's* case, *supra*, 1908-10 All E.R. Reprint at p. 683; *Seymour's* case, *supra*, 1927 All E.R. Reprint at p. 303; I.T. case 70, 3 S.A.T.C. at p. 59; I.T. case 339, 8 S.A.T.C. 360. In the present case the gifts were in fact made recurrently. Another consideration indicating that the payment is to be regarded as income, is that the recipient has a reasonable hope or expectation or contemplation that it will be paid; cf. *Corbett* v. *Duff*, (1942) 1 All E.R. at p. 514; *Taxation Commissioner of Australia* v. *Squatting Investment Co., Ltd.*, 1954 A.C. at p. 212; *Dixon's* case, *supra*, 5 A.I.T.R. at p. 449. In the present case, the terms of the University's letter were such as to lead the taxpayer reasonably to expect that, although she might not be able to sue for the payments, they would, in fact, be made regularly; cf. *Stedeford* v. *Beloe*, 16 T.C. 505. In so far as the Judges' view in that case are in conflict with the views of the Judges in *Dixon's* case, *supra*, it is submitted that the latter are to be preferred. Alternatively, even if, on a proper view, the relevant receipt by the taxpayer is a receipt of a capital nature, it falls to be taxed as an annuity under para. (*a*) of the definition of "gross income" in the Act. The term "annuity" is not defined in the Act, nor has it been defined by this Court. It is not necessary, in order that a payment should be an annuity for the purpose of the Act, that it should be made in performance of a legal obligation. A voluntary payment may be an annuity for this purpose. As far as I.T. case 761, 19 S.A.T.C. at p. 106, is concerned, the relevant portion of PRICE, J.'s, definition is an *obiter dictum*. While it may be a useful guide as to what is an annuity, it should not be taken to be a comprehensive definition to be applied in all circumstances. PRICE, J.'s, definition has been quoted in I.T. case 768, 19 S.A.T.C. 211; I.T. case 783, 19 S.A.T.C. 413; I.T. case 962, 24 S.A.T.C. 651. In I.T. case 768, *supra* at p. 213, DE WET, J., doubted whether it is essential that an annuity should be repetitive. This doubt is supported by the first two meanings in the *Oxford Dictionary* (see I.T. case 761, 19 S.A.T.C. at p. 105), and by *Hennell* v. *I.R.C.*, (1933) 1 K.B. at pp. 421, 422, and *Martin* v. *Lowry*, 1927 A.C. at p. 315. In I.T. cases 768, *supra* and 783, *supra*, para. 3 of PRICE, J.'s, definition, although quoted, was not relevant to the point in issue. In I.T. case 962, *supra*, that paragraph was discussed at p. 655 and the Court found, as one of the elements in deciding that the option moneys paid in that case were annuities, that the option holder had no discretion

to avoid the payments. The necessity for applying this test was accepted, but not discussed, by SMUTS, J. In other Special Court cases, where the meaning of the term "annuity" was considered, the element of "chargeability" was not mentioned as an essential element of an annuity, e.g. I.T. case 584, 14 S.A.T.C. at pp. 18-9; I.T. case 826, 21 S.A.T.C. at pp. 190-1. Various dictionary definitions of the term "annuity" are quoted in the former case at p. 119. They were repeated by PRICE, J., in I.T. case 761, *supra* at p. 105, and DE WET, J., in I.T. case 768, *supra* at p. 213. Although the English text of the Act was signed by the State President, the definition of "jaargeld" in van Dale's, *Nieuw Groot Woordenboek der Nederlandsshe Taal*, which is the word used in the Afrikaans text, may be added to those referred to above. Although some of the above definitions refer to charging a person or to a sum that is "payable", the fact that not all of the definitions use such terms show that it is not an essential element of an annuity that some person should be legally obliged to make the payment. In particular, in most cases where there is a legal obligation to pay an annuity, the payments would be income payments in any event, and the fact that in para. (*a*) of the definition of "gross income" the Legislature has included annuities of a capital nature is an indication that it intended to include annuities that are paid voluntarily. Some apparent support for the contrary view, namely that it is an essential feature of an annuity that some person should be under a legal obligation to pay it, is to be found in the judgments in *Stedeford's* case, *supra* at pp. 520-2. However, the Judges were not intending to lay down that the term "annuity" is not apt to describe payments which are made voluntarily, but merely that such payments were not annuities in terms of the schedule because they were not income. That the term "annuity" has no meaning in England involving a legal obligation is suggested by a *dictum* of ROWLATT, J. in *Stedeford's* case, *supra* at p. 510. Therefore the meaning that should be given to the term "annuity" in para. (*a*) of the definition of "gross income" is simply a payment in respect of a particular year or years in accordance with the first of the two meanings *supra* ascribed to it in the *Oxford Dictionary*. It is to be distinguished from, (*a*) a lump sum payment not made in respect of a particular year or years, such as was made in *Lunnon's* case, *supra*, and I.T. case 60, *supra*, the cases relied on by the Special Court; (*b*) payments which, although annual, represent repayments of capital or the discharge of an antecedent debt; see I.T. case 783, *supra* at p. 416; *L.* v. *Commissioner of Taxes*, 1948 (3) S.A. 737 and the English case there referred to, and *C.I.R.* v. *Milstein*, 1942 T.P.D. at p. 64. In the result, whether the relevant payment to the taxpayer be regarded as a single gift for the year concerned, or as one of a succession of annual gifts, it was received by way of annuity for the purposes of the Act.

W. H. R. Schreiner, for the respondent: The words "receipts and accruals of a capital nature" refer to those receipts and accruals which do not partake of the nature of income "in its economic sense", and income in its economic sense means, in general, receipt or accrual which is the product of some activity by the taxpayer, the product of capital invested or the product of the exercise of the labour or wits of the recipient; see *Commissioner of Taxes* v. *Booysen's Estates*, 1918 A.D.

at p. 594; *C.I.R.* v. *Lunnon*, 1924 A.D. at p. 98; *C.I.R.* v. *I. H. B. King*, 1947 (2) S.A. at p. 211. The other type of case where, in ordinary parlance, a receipt or accrual can be said to be of an income nature, is where there is a fund or a contractual source the proceeds from which from time to time are received by, or accrue to, the taxpayer. A gratuitous payment, where it has no direct connection with any activity on the part of the recipient and is not the proceeds of any capital invested on his behalf, is therefore not of an income nature; see *Lunnon's* case, *supra* at p. 97; *C.I.R.* v. *Brooks*, 1964 (2) S.A. at p. 574. The mere fact of annuality by itself does not alter the legal nature of each donation; cf. *Lunnon's* case, *supra* at p. 98. A gratuitous payment may, in the hands of the recipient, constitute a receipt of an income nature where the payment is connected with, or a substitute for, or as a matter of fact, is the result of some activity on the part of the recipient; cf. *Moolman* v. *C.I.R.*, 1954 (2) S.A. 560 at p. 568; *Commissioner of Taxation of the Commonwealth of Australia* v. *Squatting Investment Co. Ltd.*, 1954 A.C. at p. 142; *de Villiers* v. *C.I.R.*, 1929 A.D. 227 at pp. 232-3. The same sort of situation arises in those cases decided in England where the recurrent amounts are paid to persons by way of Easter offering, or the proceeds of a benefit match are paid to sportsmen. In each such case the payment, though voluntary, is, as a matter of fact, regarded by the persons concerned therewith as an addition to the ordinary emoluments of the person who rendered the service; see *Blakiston* v. *Cooper*, 1909 A.C. 104; *Corbett* v. *Duff*, (1941) 1 All E.R. 512; *Federal Commissioner of Taxation* v. *Dixon*, 5 A.I.T.R. at pp. 456-9. In the present case, as far as respondent was concerned, there was nothing for which the payment was a substitute and no right which she had as against the University and nothing which she had done from which the payment could by direct association acquire a particular character. On the retirement of her late husband the University was under no legal obligation toward him and *a fortiori* the University owned respondent no duty; cf. *Stedeford* v. *Beloe*, (1931) 2 K.B. at p. 620; *Duncan's Executors* v. *Farmer*, 1909 S.C. 1212. Receipts or accruals from trusts, in which the trustee has a discretion as to payments to the beneficiaries, are taxable for the reason that, when the trustee exercises his discretion, a right accrues to the beneficiaries which is in the nature of income; see *Estate Munro* v. *C.I.R.*, 1925 T.P.D. at pp. 697-8; *de Beer* v. *C.I.R.*, 1932 C.P.D. at pp. 447-8; *Mount Moreland Town Lands Board* v. *C.I.R.*, 1929 A.D. at p. 82. Similarly, where a will provides for recurrent payments to a beneficiary, such payments may be income in his hands, even if they are to be made from the capital of the estate; see I.T. 70, 3 S.A.T.C. 58; I.T. case 339, 8 S.A.T.C. 360. But in such a case the beneficiary has an enforceable right to claim payment when each amount falls due and the element of annuality or recurrence becomes of importance in determining its nature. As to the statement in the Special Court's judgment that there is "nothing to indicate any formal acceptance by respondent", and that any formal acceptance of the particular donation in the year of assessment would not affect the question of whether or not the payment to her was an amount received "by way of annuity", it is submitted that the words "by way of annuity" mean "under an annuity" or as "a part of an

annuity" and that the presence or absence of an acceptance of a particular periodical payment is irrelevant to the present enquiry. As to the narrower meaning of "annuity", see *Oxford English Dictionary* (*s.v.* "annuity"). This meaning is in no sense not an "ordinary" meaning. The fact that it is a narrower meaning does not connote that it is "unusual" or "extraordinary". It is by no means unlikely that the Legislature intended this narrow meaning in the Act. Receipts resulting from an annuity in the sense defined, would, except in the case of perpetual annuities, consist partly of income and partly of capital, and the express provision in regard to amounts received by way of annuity may well have been intended to stipulate that, in the case of annuities in this sense, receipts or accruals, even if they consist partly of income and partly of capital, fall within the definition of "gross income". There is nothing in the Act which would indicate that a wider meaning was intended and, in these circumstances, a Court would construe the provision in a manner which would impose a smaller burden on the taxpayer; cf. *Israelson* v. *C.I.R.*, 1952 (3) S.A. at p. 540. If a somewhat wider meaning is to be given to the word "annuity", it must involve the notion of continuance of payment from year to year and the idea of "chargeability" is essential. Chargeability means that the payment of periodical amounts is enforceable by reason of some overriding obligation which the recipient is entitled to enforce. The definition of an "annuity" given by PRICE, J., in I.T. case 761, 19 S.A.T.C. at p. 106, which has been quoted in subsequent cases, is the widest that should, in the circumstances, be placed upon the term. As pointed out in I.T. case 962, 24 S.A.T.C. at p. 652, it excludes cases where there is a discretion vested in the payer as to whether he will pay or not, as in the case of someone who entirely gratuitously and without any obligation to do so, from time to time or even yearly makes a present to another. In I.T. case 584, 14 S.A.T.C 116, and I.T. case 826, 21 S.A.T.C. 189, the element of chargeability was present and the Courts were not concerned with the question of purely voluntary periodical payments which were not the consequence of some overriding obligation.

McEwan, in reply.

Cur. adv. vult.

Postea (September 14th).

HOLMES, J.A.: This appeal concerns firstly the meaning of the word "annuity" in the definition of "gross income" in sec. 1 (xi) (*a*) of Act 58 of 1962. The word is not defined in the Act and has not hitherto been the subject of decision in this Court.

A person's gross income is—in so far as is here relevant—defined as meaning, in relation to any year or period of assessment—

". . . the total amount received by or accrued to or in favour of such person during such year or period of assessment . . . excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely—

(*a*) any amount received or accrued by way of an annuity";

It will be seen that if an amount in question is received by way of an annuity, it is part of gross income whether or not it is of a capital nature. If it is not an annuity, the further question arises whether the amount is a receipt or accrual of a capital nature, in which event it is excluded from gross income.

The appeal arises in this way:

1. The taxpayer is the widow of the late Professor Watermeyer, who was at one time on the staff of the University of the Witwatersrand. At the time of his death in 1951 he was receiving a pension paid to him under the University Institutions' Provident Fund. In addition he had for several years been receiving an *ex gratia* payment of R150 per year from the Witwatersrand University. The background of the latter payment is as follows:
2. In 1946 the Council of the University decided that members of the staff should, on retirement, continue to receive, *ex gratia* and until 1952, an amount equal to the cost-of-living allowance which they had been receiving before retirement (R150 in the case of a married man). From 1953 the *ex gratia* payment was fixed without reference to the cost-of-living allowance, and the payment was subject to review each year and made entirely at the discretion of the Council.
3. In 1955 the Council re-examined its scheme with the object of determining afresh the amounts of the *ex gratia* annual payments.
4. It was also decided that every retired member would be informed of the amount which the Council had decided to pay him in 1956 and until further notice.
5. After the death of Professor Watermeyer in 1951, the University voluntarily continued the *ex gratia* payments to his widow, in recognition of her late husband's long service to the University.
6. Following upon the review of the *ex gratia* payment scheme in 1955 (see para. 3 above), the amount of the payment to the widow was determined at R300 *per annum*, the amount which had been paid to her in previous years. In a letter dated 8th March, 1956, the Registrar of the University informed her that the Council had decided to continue to make an *ex gratia* payment to her of R300 *per annum* and hoped to be able to continue this payment for her lifetime.
7. In his determination of the taxpayer's liability for normal tax for the year of assessment ended 30th June, 1962, the Secretary included the R300 in the taxable income.
8. Against the resultant assessment the taxpayer lodged objection on the grounds that the R300 received from the University was an *ex gratia* payment made entirely at the discretion of the University and therefore was not taxable. The objection was dismissed.
9. On appeal, the Special Court held that the R300 received by the taxpayer was a gift or donation which was a capital accrual; that it was not received by way of an annuity; and that accordingly it was not part of the taxpayer's "gross income" as defined in sec. 1 (xii) (*a*) of Act 58 of 1962.

10. The Secretary now appeals to this Court. He does not ask for costs in the event of success. Furthermore, we were informed from the Bar that as it is a test case the Secretary has undertaken to pay the taxpayer's costs of appeal.

I turn now to the specific question whether the taxpayer received the sum of R300 in 1962 "by way of an annuity" as contended for by counsel for the Secretary. The Legislature has not defined "annuity" and I do not consider that it is either necessary or desirable to try to formulate a touchstone definition applicable to all cases. It will be sufficient for the purposes of this case to refer to one or two basic or essential characteristics, without which there cannot be an annuity. Used in regard to payments, the word, from its very nature, postulates the element of recurrence, in the sense of annual payments (even if made, say, quarterly during the year). And this element of necessary annual recurrence cannot be present unless the beneficiary has a right to receive more than one annual payment. This seems to me to be axiomatic, and there is no need to make it sound portentous by parading the authorities. It is sufficient to say that it is consistent with what was said by PRICE, J., in *Income Tax Case* No. 761, 19 S.A.T.C. 103 at p. 106; and by JENKINS, L.J., in *Inland Revenue Commissioners* v. *Whitworth Park Coal Co. Ltd.* (*In liquidation*), 1958 Ch. 792 at p. 815. Hence *de facto* recurrent payments, if voluntary and payable at will, do not qualify as annuities.

I would add that the use of the word "annuity" in other parts of Act 58 of 1962 is not inconsistent with the foregoing; see, for example, the proviso to the definition of "retirement annuity fund" in sec. 1 (xxviii).

In the present case it is common cause that the payments to the widowed taxpayer were voluntary and payable at the will of the Council. Although the payments were made year by year there was no right of recurrence. In the result, the Court *a quo* was right in holding that the payment in question was not received "by way of an annuity".

The next question is whether the payment was "of a capital nature" in which event it is excluded by definition from the taxpayer's gross income.

As to that, where *ex gratia* yearly amounts are payable at will, *de jure* each payment is a separate individual gift. The most that the recipient has, in regard to continuance or regularity, is the *spes* of recurrence year by year. The payment does not therefore have the element of assured recurrence or annuality which, as was said in *Commissioner for Inland Revenue* v. *Lunnon*, 1924 A.D. 94 at p. 98, is sometimes a consideration pointing to income as distinct from capital. Ordinarily, a gift does not have any of the hall-marks of income, which, considered in relation to capital, is revenue derived from capital productively employed; see *Commissioner of Taxes* v. *Booysen's Estates Ltd.*, 1918 A.D. 576 at p. 595. The capital need not necessarily consist of money: a working man's sole capital may be his capacity to work, and his earnings are his income. As regards pensions, usually they are a matter of right, and are directly related to the recipient's employment, and are income. But these are not comparable in principle with the gift of an *ex gratia* pension, payable at will, to a former employee's widow.

In *Stedeford* v. *Beloe*, 1932 A.C. 388, the House of Lords reiterated at p. 390 that a mere voluntary gift

"is not, in the true sense of the word, income. It is merely a casual payment which depends upon somebody else's goodwill."

In consequence it was held that payments to a retired headmaster, by way of an *ex gratia* pension payable at will, were not profits or gains under the taxing statute because they consisted of a succession of voluntary gifts. This reasoning appears to be sound.

There have of course been special cases in which it was held that a gift did amount to income, as counsel for the Secretary pointed out. But in each such case some other cogent factor was present. For example, in *Moolman* v. *C.I.R.*, 1954 (2) S.A. 560 (A.D.), a voluntary payment, made by the Union Government to a wool farmer, was held to be income and taxable. But there the distinctive feature was that the receipt was in respect of wool sold by the taxpayer in the course of his occupation as a wool producer and amounted to a profit made by him as the result of his operations; see p. 568 C-D of the report.

Similarly, in *Blakiston* v. *Cooper*, 1909 A.C. 104, a freewill gift of the voluntary Easter offerings to a vicar was held to be taxable as being profits accruing to him by reason of his office, in the language of the taxing statute. The special feature was that the gift accrued to him in respect of his services as vicar.

There is also the case of *Federal Commissioner of Taxation* v. *Dixon*, 10 Australian Tax Decisions 82, upon which counsel for the Secretary relied strongly, and I shall therefore deal with it in some detail. There the taxpayer, until he voluntarily enlisted in the Australian Imperial Forces in 1940, was employed as a clerk by a company. During the tax year ended 30th June, 1943, the company, in pursuance of a notification to the staff in 1939 which was described as "reviewable", paid him £104 to make his army pay up to the amount which he would have received as salary. This was held to be income. As appears from p. 86 of the report, the *ratio* of the judgment of the Court was:

"Because the £104 was an expected periodical payment arising out of services 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 . . ."

In my view the feature that the payment there in question was one of "arising out of services which attended the war service undertaken by the taxpayer"

distinguishes that case from the present case, in which the payment in question was one made to a former employee's widow, unrelated to any services by her, and constituted a donation *simpliciter*.

To sum up on this issue, the payment of R300 was a gift, unattended by any features associating it with income, and it was therefore a receipt of a capital nature, as the Court *a quo* rightly held, and in consequence it was not taxable.

In the result the appeal by the Secretary fails, and is dismissed with costs.

STEYN, C.J., BEYERS, J.A., BOTHA, J.A., and TROLLIP, A.J.A., concurred.

Appellant's Attorneys: *State Attorney*, Pretoria; *Deputy State Attorney (O.F.S.)*, Bloemfontein. Respondent's Attorneys: *van Hulsteyn, Feetham & Ford*, Johannesburg; *Fred S. Webber & Son*, Bloemfontein.

S. v. HLAPEZULA AND OTHERS.

(APPELLATE DIVISION.)

1964. *November* 23, 26. HOLMES, J.A., WILLIAMSON, J.A., and VAN WINSEN, A.J.A.

Criminal procedure.—Evidence.—Accomplice.—Corroborating evidence given by another accomplice.—Such found to be reliable.—Risk of wrong conviction reduced.

Where corroborative evidence of an accomplice implicating the accused in the commission of the crime is given by another accomplice, the latter's evidence, if regarded as reliable, may, depending on the circumstances, satisfactorily reduce the risk of a wrong conviction. The trial Court will of course bear the cautionary rule in mind also in relation to the corroborating accomplice, and will enquire as to the presence of some safeguard reducing the risk of a wrong conviction.

Appeal from a conviction in the Butterworth Circuit Local Division (MUNNIK, J.). The facts appear from the judgment of HOLMES, J.A.

H. C. J. Flemming, for the appellants.

C. T. Howie, for the State.

Cur. adv. vult.

Postea (November 26th).

HOLMES, J.A.: The five appellants were charged before MUNNIK, J., sitting in the Butterworth Circuit Local Division, with the crime of house-breaking with intent to steal and theft, with aggravating circumstances. The gist of the particulars was that on 12th March, 1964, the appellants, in possession of fire-arms, broke into the Blackhill Trading Store, in the district of Qumbu, and stole R1,602 in cash, R328 in cheques and postal orders, and 18 registered letters; and that they or an accomplice assaulted or threatened to assault Mervyn Moore, the manager, and Mbelwana Sletile, a night-watchman, with intent to do grievous bodily harm, by discharging a fire-arm at them.

The appellants pleaded not guilty and were represented by counsel. In a considered judgment the trial Court convicted them all. They were sentenced to varying terms of imprisonment.

According to the evidence of the manager, Moore, who lives in a house next door to the trading store, the latter was broken into between 1 a.m. and 4 a.m. on 12th March, 1963. It is clear from his evidence that there were several intruders, and that some of them carried fire-arms because they fired some shots at the night-watchman. After they had accomplished their purpose and had departed, Moore found