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 HIGH COURT OF JUSTICE
 (CHANCERY DIVISION)—22 AND 29 NOVEMBER 1978

COURT OF APPEAL—17 AND 18 APRIL AND 9 MAY 1980

HOUSE OF LORDS—16, 17 AND 18 JUNE AND 22 OCTOBER 1981

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Edwards (H.M. Inspector of Taxes) v. Clinch⁽¹⁾

Income tax, Schedule E—Office—Inspector appointed to hold public local inquiries by Secretary of State for the Environment—Income and Corporation Taxes Act 1970, s 181(1).

- C The taxpayer, a chartered civil engineer, was one of a panel of some 60 persons invited from time to time by the Department of the Environment to act as Inspectors to hold public local inquiries in accordance with s 5(1), Acquisition of Land (Authorisation Procedure) Act 1946, and to report to the Secretary of State. He would be contacted by an official who would inform him of the location and date of an inquiry and the daily fee payable and who would invite him to undertake it. If he accepted this invitation, the relevant papers would be forwarded to him, together with an appointment signed by the Secretary of State. The taxpayer was remunerated solely by the daily fee but in addition received travelling and subsistence allowances on Civil Service scales. He was solely responsible for the conduct and procedure at the inquiry subject to the rules governing tribunals and inquiries. If he became ill, or had urgent business to attend to, during the course of the inquiry, he could ask to be released. He had hitherto been assessed in respect of the fees received under Schedule D, but for the years in question had been assessed under Schedule E, which he feared might reflect upon his independence as an Inspector. The Commissioners rejected the Revenue contention that the taxpayer held an office because they regarded the appointment as a transient, indeterminate, once-only execution of a task.

The Chancery Division, allowing the Crown's appeal, held that in acting as an Inspector from time to time the taxpayer had been holding a series of offices.

- G The Court of Appeal, allowing the taxpayer's appeal, held (i) that the taxpayer did not hold an "office" within the meaning of Schedule E in respect of the public inquiries which he was appointed to conduct in that each appointment, being effective only for the purpose of the particular inquiry to

(¹) Reported (Ch D) [1979] 1 WLR 338; [1979] 1 All ER 648; [1979] STC 148; 122 SJ 863; (CA) [1981] Ch 1; [1980] 3 WLR 521; [1980] 3 All ER 278; [1980] STC 438; 124 SJ 397; (HL) [1982] AC 845; [1981] 3 WLR 707; [1981] 3 All ER 543; [1981] STC 617; 125 SJ 762.

which it related and therefore personal to the taxpayer, lacked the qualities of permanence and independent existence which were essential to an office; (ii) that, accordingly, the taxpayer fell to be assessed not under Schedule E, but under Schedule D. A

Per Buckley L.J.: An "office" is a post which can be recognised as existing, whether it be occupied for the time being or vacant, and which, if occupied, does not owe its existence in any way to the identity of the incumbent or his appointment to the post. It must owe its existence to some constituent instrument, whether it be charter, statute, declaration of trust, contract (other than a contract of personal service) or instrument of some other kind. It must also have a sufficient degree of continuance to admit of its being held by successive incumbents: it need not be capable of permanent or prolonged or indefinite existence, but it cannot be limited to the tenure of one man, for if it were so it would lack that independent existence which the word "office" imports. It may be that it should in some degree possess a public character, but it is unnecessary to decide that point in this case, for the taxpayer's functions in respect of which the fees were received undoubtedly had such a character. The Crown appealed. B C

Held, in the House of Lords, and dismissing the Crown's appeal, by a majority (Lords Edmund-Davies and Bridge of Harwich dissenting) that the taxpayer did not hold an "office" within the meaning of Schedule E and accordingly was not assessable to tax under that schedule. D

Per Lord Wilberforce: "For myself I would accept that a rigid requirement of permanence is no longer appropriate, nor is vouched by any decided case and continuity need not be regarded as an absolute qualification. But still, if any meaning is to be given to 'office' in this legislation, as distinguished from 'employment' or 'profession' or 'trade' or 'vocation' (these are the various words used in order to tax people on their earnings), the word must involve a degree of continuance (not necessarily continuity) and of independent existence; it must connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed." E F

CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the General purposes of the Income Tax for the Division of Rochford for the opinion of the High Court of Justice.

1. At a meeting of the said General Commissioners held at the Court House, Victoria Avenue, Southend-on-Sea, on 25 March 1977, Frank Howard Clinch (hereinafter called "Mr Clinch") appealed against assessments: – for 1973–74 in the sum of £6678, and for 1974–75 in the sum of £11579, made upon him under Case I of Schedule E of the Income and Corporation Taxes Act 1970, in respect of certain emoluments. G

2. The question for our determination was whether certain sums which the Department of the Environment paid to Mr. Clinch were assessable to tax under Schedule E or under Schedule D Case II. H

3. The following facts were proved or admitted:

(a) During the years which were the subject of the assessments Mr. Clinch was one of a panel of some sixty persons whom the Department of the

A Environment invited from time to time to act as Inspectors to hold public local inquiries in respect of matters for which the Secretary of State for the Environment was responsible.

(b) The duties of such an Inspector were to hold an independent inquiry and to make a report thereon in writing to the Secretary of State.

B (c) The procedure, as far as Mr. Clinch was concerned, was that when it became necessary to hold such a public local inquiry, he would be contacted by telephone by a Department official who would inform him of the location and date of the inquiry, and the daily fee payable, and would invite Mr. Clinch to undertake the inquiry. Mr. Clinch then had complete discretion whether to accept or refuse the invitation.

C (d) Mr. Clinch was solely remunerated by such daily fees according to the length of the inquiry, and received no retainer or salary. Payment was made by the Department only in response to a fee account submitted by Mr. Clinch. He did, however, receive travelling and subsistence allowances on Civil Service scales. No statement of "terms of employment" under the Contracts of Employment Act 1963 was ever served upon Mr. Clinch and no question of redundancy payments arose on the completion of an inquiry.

D (e) On acceptance of the invitation, Mr. Clinch would have forwarded to him the papers relevant to the inquiry together with an authority in writing, signed on behalf of the Secretary of State, appointing him to hold the particular inquiry.

E (f) Thereafter Mr. Clinch held an independent public inquiry without direction or guidance from the Secretary of State, and always announced his independent status publicly at the commencement of the inquiry.

(g) Mr. Clinch was solely responsible for the conduct and procedure at such an inquiry, subject to the rules governing Tribunals and Inquiries.

F (h) If Mr. Clinch became ill, or had some urgent business to attend to, during the progress of the inquiry, he could ask to be released from his engagement. The Department, if it consented to his release, would then find some other Inspector to conclude the inquiry.

(i) Mr. Clinch stamped his own insurance card as a self-employed person.

(j) Prior to the two years under appeal Mr. Clinch had been assessed under Schedule D in respect of fees received for holding such public inquiries.

4. The following documents were proved or admitted before us:

G (a) Letters from the Department of the Environment to Mr. Clinch dated 24 November 1972, 8 December 1972, 4 January 1973, 20 February 1973, 9 March 1973, 20 June 1973, 13 July 1973, and 24 July 1973 confirming his agreement to take inquiries.

(b) Extract from the speech of the Parliamentary Under-Secretary of State, Department of the Environment, in the House of Commons reported on page 1439 of Hansard dated 21 January 1975.

H (c) Letter of appointment of Mr. Clinch dated 4 June 1975.

(d) Notes issued by Panel Inspectorate Support Group, Department of the Environment, on 1 July 1975.

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(e) Statutory Instrument on Tribunals and Inquiries. 1967 No.720.

(f) Booklet entitled "Public Inquiries into Road Proposals" issued by the Welsh Office.

(g) Analysis of Environment Department fees assessed 1973-74.

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We accepted that, though certain documents related to years of assessment other than those under appeal, they were nevertheless relevant to the question for our determination. We also accepted that the booklet issued by the Welsh Office (document (f)) was in content similar to that issued by the Department of the Environment.

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Copies of documents (c) and (d) are annexed hereto as exhibits⁽¹⁾. Copies of the other documents are available for inspection by the Court if required.

5. It was contended by the Respondent, Mr. Clinch:

(a) that in the discharge of such duties as an Inspector holding a public local inquiry he did not hold office or employment within the meaning of Case I of Schedule E;

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(b) that the holding of each inquiry was an "ad hoc" appointment of indeterminate length;

(c) that he was a free agent—able to accept or refuse an invitation from the Ministry to hold an inquiry, and was not employed;

(d) that in all the circumstances he should have been assessed under Schedule D in respect of fees received for holding such inquiries.

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6. It was contended by Her Majesty's Inspector of Taxes:

(a) that whenever an Inspector held such an inquiry he was carrying out a public function;

(b) that his position was a public office which, on the evidence, was capable of being held by persons in succession;

(c) that the office subsisted from the date when the Inspector was appointed to the date when the report of the inquiry was delivered to the Secretary of State;

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(d) that each such office was a separate office within the meaning of s 181(1), Income and Corporation Taxes Act 1970;

(e) accordingly that the emoluments from such offices were chargeable to income tax under Schedule E and that Mr. Clinch was correctly assessed under that Schedule.

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7. In support of his contentions the Inspector of Taxes cited the following cases:—*McMillan v. Guest* 24 TC 190, at pages 201 and 202 [1942] AC 561;

(1) Not included in the present print.

A *Dale v. Commissioners of Inland Revenue* 34 TC 468, at page 490; [1954] AC 11; *Mitchell and Edon v. Ross* 40 TC 11, at pages 34 and 36; [1962] AC 813; *Commissioners of Inland Revenue v. Brander & Cruickshank* 46 TC 574, at page 58, 1971 SLT 53.

8. We, the Commissioners who heard the appeal, were of the opinion that the circumstances of the Respondent—Mr. Clinch’s discharge of the duties of an Inspector holding a public local inquiry did not amount to the holding of an office within the meaning of the said Case I of Schedule E as the appointment was merely a transient, indeterminate, once-only execution of a task for which he was peculiarly qualified—the nearest analogy to which was a barrister or solicitor conducting a case for a client. Similarly we felt that the execution of such a task could not amount to employment within the meaning of Case I as Mr. Clinch was a free agent. Accordingly we allowed the appeal—holding that Mr. Clinch was incorrectly assessed under Schedule E on the sums in dispute, and we determined the assessments in the following figures, 1973–74, £4871, 1974–75, £4651.

9. The Inspector of Taxes thereupon expressed his dissatisfaction with our determination as being erroneous in point of law, and subsequently required us to state a Case for the opinion of the High Court pursuant to s 56 of the Taxes Management Act 1970, which Case we have stated and do sign accordingly.

10. The question of law for the opinion of the Court is whether our decision was erroneous in point of law.

9 August 1977

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The case was heard in the Chancery Division before Walton J. on 22 November 1978 when judgment was reserved. On 29 November 1978 judgment was given in favour of the Crown.

The Solicitor-General (Peter Archer Q.C.) and Brian Davenport for the Crown.

F The taxpayer in person.

The cases cited in argument are referred to in the judgment.

Walton J.—The Respondent, Mr. Clinch, who is basically a distinguished chartered civil engineer, was during the tax years 1973–74 and 1974–75, and I think still is, a member of a panel of some 60 persons whom the Department of the Environment invited from time to time to act as Inspectors to hold public local inquiries in respect of matters for which the Secretary of State for the Environment was responsible. It was accepted at the hearing by both the Crown and the Respondent that the relevant statutory provisions governing such appointments are those contained in the Acquisition of Land (Authorisation Procedure) Act 1946, which by s 5(1) provides as follows: ‘For the purposes of the execution of his powers and duties under this Act, a Minister may cause to be held such public local inquiries as are directed by this Act and such other public local inquiries as he may think fit.’ Schedule 1 to that Act deals in Part I with purchases by local authorities and in Part II with purchases

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by Ministers and provides the procedure for authorisation. After providing for notices of the intended compulsory purchase to be served upon interested persons in various ways in order that objection may be taken thereto, para 4(2) of that Schedule provides as follows:

“If any objection duly made as aforesaid is not withdrawn, the confirming authority shall, by confirming the order, either cause a public local inquiry to be held or afford to any person by whom any objection has been duly made as aforesaid and not withdrawn an opportunity of appearing before and being heard by a person appointed by the confirming authority for the purpose, and, after considering the objection and the report of the person who held the inquiry or the person appointed as aforesaid, may confirm the order either with or without modifications.”

Part II of Sch 1 deals with the question of purchases by Ministers in substantially the same manner, with some necessary semantic alterations. In such cases, however, the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967, made under the provisions of s 7A of the Tribunals and Inquiries Act 1958, prescribe the procedure to be followed at the public local inquiries in such cases. I do not think that I need read any of the procedure so prescribed, save to note that these rules preserve what would be the position apart therefrom; namely, that except as otherwise specifically provided, the procedure at the inquiry is to be such as the appointed person shall in his discretion determine. It is of course of the utmost importance that “the appointed person” (whom I shall call “the Inspector”) should not only be, but should be seen to be, absolutely impartial. One is only too conscious of the fact that there has been, if not still is, a widespread though erroneous impression abroad to the effect that Inspectors are merely appointed for the purpose of rubber-stamping the Minister’s or Department’s decision and that they are simply puppets in the hands of such Ministers or Departments. Indeed, so widespread (though, let me once again emphasise, mistakenly so) is this impression that in a recent White Paper, Commd 7133, Report on the Review of Highway Inquiry Procedures (April 1978), para 27, it is stated as follows:

“The Inspectorate. Inquiries are held by persons appointed by the Secretaries of State. This has given rise to some criticism that they might be inclined to favour the Department of Transport’s proposals. In fact, the appointments are made from a panel of highways inquiries Inspectors whose names are approved by the Lord Chancellor; but in order to meet the criticism the Secretaries of State will in future, in exercising their statutory obligations, ask the Lord Chancellor to nominate a particular individual considered by him to be suitable for a particular inquiry.”

I can now take the peculiar facts of the present case from the Case Stated. The following are all proved or admitted facts⁽¹⁾:

“(c)The procedure, as far as Mr. Clinch was concerned, was that when it became necessary to hold such a public local inquiry, he would be contacted by telephone by a Department official who would inform him of the location and date of the inquiry, and the daily fee payable, and would invite Mr. Clinch to undertake the inquiry. Mr. Clinch then had complete discretion whether to accept or refuse the invitation. (d) Mr. Clinch was solely remunerated by such daily fees according to the length of the inquiry, and received no retainer or salary. Payment was made by the Department only in response to a fee account submitted by Mr.

(1) Page 369 ante

- A Clinch. He did, however, receive travelling and subsistence allowances on Civil Service scales. No statement of 'terms of employment' under the Contracts of Employment Act 1963 was ever served upon Mr. Clinch, and no question of redundancy payments arose on the completion of an inquiry. (e) On acceptance of the invitation, Mr. Clinch would have forwarded to him the papers relevant to the inquiry together with an authority in writing, signed on behalf of the Secretary of State, appointing him to hold the particular inquiry. (f) Thereafter, Mr. Clinch held an independent public inquiry without direction or guidance from the Secretary of State, and always announced his independent status publicly at the commencement of the inquiry. (g) Mr. Clinch was solely responsible for the conduct and procedure at such an inquiry, subject to the rules governing Tribunals and Inquiries. (h) If Mr. Clinch became ill, or had some urgent business to attend to, during the progress of the inquiry, he could ask to be released from his engagement. The Department, if it consented to his release, would then find some other Inspector to conclude the inquiry. (i) Mr. Clinch stamped his own insurance card as a self-employed person. (j) Prior to the two years under appeal Mr. Clinch had been assessed under Schedule D in respect of fees received for holding such public inquiries."

- Apparently there has been a change in the Revenue practice in such matters, and among Mr. Clinch's minor grievances (although, of course, in no way bearing directly on the merits of the present dispute) is that he was not notified in any way of the change of practice, or the proposed change of practice, prior to suddenly finding himself subjected to the provisions of s 204 of the Income and Corporation Taxes Act 1970 and the regulations made thereunder. When the PAYE deductions were accordingly made Mr. Clinch challenged them and took his case to the General Commissioners. They found in his favour and from their decision the Crown now appeals. I wish to make it perfectly clear, irrespective of the outcome of the present appeal, that if the facts are as Mr. Clinch has stated them to be (and I have no reason to doubt his word in the slightest) then the Revenue authorities have behaved in an extremely insensitive manner, and are to be censured accordingly. Now what has caused the change of Revenue practice is that they are now of the opinion that, when acting as an Inspector, Mr. Clinch has been holding an office within the meaning of the Income and Corporation Taxes Act 1970, s 181, and thus falls under Schedule E, as distinct from carrying on a profession or vocation falling within Case II of Schedule D—s 109(2) of that Act.

Mr. Clinch's arguments before the General Commissioners are set out in the Case Stated as follows⁽¹⁾:

- H "(a) that in the discharge of such duties as an Inspector holding a public local inquiry he did not hold office or employment within the meaning of Case I of Schedule E; (b) that the holding of each inquiry was an 'ad hoc' appointment of indeterminate length; (c) that he was a free agent—able to accept or refuse an invitation from the Ministry to hold an inquiry, and was not employed; (d) that in all the circumstances he should have been assessed under Schedule D in respect of fees received for holding such inquiries;"

- I and he repeated these very persuasively before me. But before I come to deal specifically with these arguments and the reply of the Crown thereto, it was quite obvious from the whole tenor of Mr. Clinch's address to me that the real nub of the matter so far as he is concerned is essentially this: that he is afraid

(1) Page 370 *ante*

that, if the decision should go against him and it should be held that he is indeed holding an office within the meaning of s 181, in some manner his independence will thereby be compromised. This I wish emphatically to refute. A moment's thought will suffice to show that no man's independence is threatened by the income tax Case under which he happens to be taxed—as distinct from the amount of tax which may be extracted! He remains as independent *quoad* the outside world both in fact and in law no matter what Schedule may be used to tax him. Nor do I think that in the eyes of the outside world the holder of an office is any more (or less) identified with the person who appointed him than is an appointed person identified with the person who appointed him. Indeed, the status of a person who may on one view be said to have been appointed to an office and on another view merely to be carrying on his own trade, profession or vocation is in both cases exactly and precisely the same. He is bound by precisely the same statutory constraints, subject to the statutory duties and entitled to the same statutory privileges in both cases. It is only the label which is different. There is no essential change of status whatsoever. Were it not for the tax consequences, it would simply be like Mr. Jourdain discovering for the first time late in life that he had been talking prose all his life without realising it. Therefore, I am certain that Mr. Clinch's fears in this direction are groundless.

What, then, is meant by the word "office" in s 181? There is some slight guidance to be found in some of the cases, to which I must shortly refer. The earliest in point of date is *Great Western Railway Co. v. Bater*⁽¹⁾ 8 TC 231. The question there was whether a £130 per annum clerk in the employment of the Great Western Railway held a "public office or employment". Rowlatt J., had he not been constrained by authority to a different view, would have found that he did not. He said, at page 235:

"Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound. I am not going to decide that, because I think I ought not to in the state of the authorities, but my own view is that the people in 1842 who used this language meant by an office a substantive thing that existed apart from the holder. If I thought I was at liberty to take that view I should decide in favour of the Appellants, but I do not think I ought to give effect to that view because I think it is really contrary to what was proceeded upon in substance in the *Lancashire and Yorkshire* case⁽²⁾ in 1864 and one ought not lightly to depart, of course, from a course of business proceeded upon in matters of this kind."

However, the House of Lords by a majority reversed this decision and Lord Atkinson expressly approved this passage from Rowlatt J.'s

(¹) [1922] 2 AC 1.

(²) *Attorney-General v. Lancashire & Yorkshire Ry. Co.* (1846) 2 H & C 792.

A judgment. The next case is *McMillan v. Guest*⁽¹⁾ 24 TC 190, where a director of the well-known company, A. Wander Ltd., was held to hold a public office within the meaning of Schedule E, basically because the position was subject to statutory regulation under the Companies Acts. The passage from Rowlatt J.'s judgment to which I have already referred was cited with approval by Lord Atkin in the House of Lords. There followed *Dale v. Commissioners of Inland Revenue*⁽²⁾ 34 TC 468, where B executors and trustees under a will which provided that £1,000 a year (free of tax) should be paid to each of them so long as they acted as such and did not receive remuneration from certain other sources held offices of profit for the purposes of the taxing statutes. Lord Normand delivered the leading judgment and, at page 490, he said this:

C “The words ‘of profit’, I have no hesitation in saying, qualify the word ‘office’. The first point to consider is whether trusteeship is within the ordinary sense of the word an ‘office’, and on this I can only say that ‘office’ is an apt word to describe a trustee’s position, or any position in which services are due by the holder and in which the holder has no employer. In *Attorney-General v. Eyres*⁽³⁾... Channell, J. held that a trustee is ‘the holder of an office’ within the meaning of Section 2(1) of the Finance Act, 1894. The word ‘office’ is used both in Section 14(3) of the Finance Act, 1948, and in Section 2(1) of the Finance Act, 1894, in its ordinary sense, uncontrolled by any special context, and I agree with Channell, J. in thinking that it includes trusteeship. If the trustee is given an annuity under a will on condition that he continues to act as trustee, I cannot doubt that he holds an office of profit. The phrase is not a term of art, and there is again no context which prevents it from being understood in its ordinary sense. To my mind, a remunerated office is an office of profit”;

and virtually all their Lordships expressed complete agreement with Lord Normand. In *Mitchell and Edon v. Ross*⁽⁴⁾ 40 TC 11 a part-time consultant under the National Health Service was held to hold an office as he was an instrument of the Minister for the carrying out of the general scheme of the National Health Act. Finally, in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁵⁾ 46 TC 574 it was held that a firm of law agents carrying on business as registrars of companies held offices within Schedule E.

G This is all the guidance which is available from the authorities. From the Oxford English Dictionary—for the word “office” is, after all, an ordinary English word, though usable in many different ways—one can take the following definitions:

H “A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority, or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc.”

I Putting all this together, is the conclusion that a person appointed to conduct an inquiry under the 1946 Act holds an office or not? I do not think that there would be the slightest doubt about the position save for two matters to which I must allude in more detail below. The factors which in my view

(1) [1942] AC 561.

(2) [1954] AC 11.

(3) [1909] 1 KB 723.

(4) [1962] AC 813.

(5) [1971] 1 WLR 212; 1971 SC (HL) 30.

would otherwise make such conclusion inevitable are: (1) That the Inspector has no employer. It is of course quite true that the person who pays him, whoever that may be, has to deduct tax in accordance with the PAYE system if the Inspector is assessable under Schedule E and that that person is, for the purposes of the regulations (see Income Tax (Employment) Regulations 1973, regn 2(1)), called the employer. However, apart from this artificial use of the word "employer", an Inspector has no employer. Provided that he keeps within the statutory guidelines, nobody can tell him what to do or how to do it. (2) That the person who conducts the inquiry is the person appointed, the Inspector, and not Mr. Clinch considered as a person. Without the appointment having first been made, his acts would be wholly nugatory. (3) That the duty placed upon the Inspector was one which was placed by statute. Of course, he need not accept office but, having accepted office, the duties attached to it were statutory. (4) That in the event of the person originally appointed not for any reason carrying out the duties placed upon him, the only method of procedure (apart from abandoning the proposed inquiry altogether) would be to appoint another Inspector. As I say, a combination of these facts appears to my mind to point irresistibly to the conclusion that the appointed person holds an office. And when, in addition to that, one has the circumstances that his remuneration, through whatever channel it is paid, is obviously paid out of public funds, it becomes clear that he is in fact holding a public office. However, Mr. Clinch, in his able, moderate and persuasive argument, took two particular points. First, that, in complete contradistinction to the description of an office given by Rowlatt J. in the passage I have cited above, the so-called "office" here was of a merely temporary nature: it was the reverse of permanent, in that once his report had been delivered he was *functus officio* and that was an end of that inquiry. Secondly, that in all the cases which I have summarised above the person found to be holding an office had enjoyed a steady remuneration therefrom, whereas an Inspector was paid by means of fees calculated so as to reflect the time which had been spent on the discharge of his duties under the appointment.

I feel the force of Mr. Clinch's first point, but I am unpersuaded by it. I do not think it is a proper use of authority to wrench a statement such as that made by Rowlatt J. out of context. The context in which he was making that statement was in relation to who might conceivably be, and who might not conceivably be, the holder of a public office in a railway company. When one is considering that kind of case—and this is the only kind of case which has fallen to be considered by the courts so far—it is natural to dwell upon the contrast of permanence and impermanence. One can scarcely believe that somebody holding what turns out to be a temporary job on the railway is holding a public office therein: and the natural contrast is with those offices which are of their own nature fairly permanent, such as station-masters and the like. However, in my judgment there is nothing essentially permanent about an office. It all depends upon the duties of the office. The Solicitor-General instanced an imaginary person appointed by statute to act as supervising officer of the forthcoming Scottish referendum. There could be no question but that the position would be temporary—and also, I should consider, no doubt but that it would constitute an office (and a public office at that) within s 181. In other words, whilst the permanency of the duties to be discharged may well, in a suitable case, form an apt guide as to whether the person discharging them is or is not holding an office, this test is wholly inapplicable to a case where the office is confined to the discharge of one (or a few) specific duties which, in the very nature of such duties, will be discharged within a finite space of time.

- A Mr. Clinch's second point is based on the remuneration which he receives, which based upon the fee notes which he renders. He says, and says correctly, that in none of the other cases to which I have already referred in which a person had been found to hold an office has the remuneration been by way of fees—professional fees. Be that so, I cannot conclude that the method of calculation of remuneration has real bearing upon the nature of the function performed by the recipient. But, if there is anything in this point at all, I think it is the other way round. In a marginal case I can conceive it might well be decisive that the person in question was in receipt of a salary, thus making it apparent that he was a person who had an employer who paid him his salary, as distinct from a person who received remuneration by way of a scale of fees, which, in so far as it indicates anything, indicates that he does not necessarily have an employer.

- So I come to the conclusion that in his work as an Inspector Mr. Clinch has been holding, for the purposes of the Income and Corporation Taxes Act 1970, a series of offices offices which are indeed public offices, and to which he has from time to time been appointed by the persons having the power of appointment to such offices. I think that this also coincides with popular understanding. It is not Mr. Clinch, the distinguished chartered civil engineer, who presents his report at the end of the inquiry: it is the Inspector appointed for that purpose, the holder of an office, and not the person himself. However, this is by no means the end of the analysis, because the Solicitor-General posed this question: On the facts of the present case as found by the General Commissioners, what other conclusion is open, seeing that it has not been found as a fact that Mr. Clinch was at the relevant time carrying on any other profession of which the holding of such inquiries might he said to have formed part? There is obviously no profession which consists exclusively of carrying out inquiries and, as no other profession is suggested, there can be no other conclusion. I think this is probably a fair enough argument as matters now stand on the Case Stated, but if I had thought that the appeal fell to be decided on so narrow and technical a ground I should undoubtedly (unless the Crown had then and there agreed as a further fact that Mr. Clinch was carrying on a separate profession as a civil engineer) have remitted the case to the Commissioners to find further facts.

- So I do not think that this point is decisive of the appeal in any way, but I think it does highlight the crucial point. Mr. Clinch conducts an inquiry not because he is a civil engineer but because he has been appointed to do so; and such appointments are by no means confined to civil engineers. Other professions may be asked to supply Inspectors—including, now, the Bar. And, whatever the practice may be as to the sensible restriction of members of the panel to professional persons, some facet of whose normal work would doubtless assist them in their task, there is no necessary restriction of the membership to any particular professions. Inspectorship is therefore a matter which, if it is to be regarded as an aspect of a profession, falls within many professions. This cannot, I think, be correct. Mr. Clinch suggested that there was an analogy with the services rendered by a barrister for a client, but there is here no analogy whatsoever as the aim of a barrister is, if he can, consistently with the etiquette of the Bar and all other hurdles in his path, to produce a particular result for a particular person or group of persons. This is totally different from the duties of an Inspector. If a closer analogy is required it is surely to be found in trusteeship, seeing that trustees are commonly drawn from many professions and from none, and where, as we know, it is quite clear that they hold an office. Trustees, of course, owe duties to many persons: but they may even owe duties to persons yet unborn, and they may not consciously

place the interests of any one such person above the others. This is much the same situation as that in which the Inspector finds himself. A

I would finally, in deference to Mr. Clinch's arguments, deal with one or two minor points which he sought to make but which do not, I think, have any real bearing on the matters in issue. As I have already indicated, his main worry in all this matter has not been to avoid the payment of any tax at all but to assert and maintain his complete independence. His fear is that if he is holding an office he will in some way be tarred with the brush of the Department conducting the inquiry. As I have already indicated, his fears are groundless. One of the reasons why I have found he is holding an office is precisely because he does not have, in the strict sense, an employer: whereas I think that, if he was in fact exercising his profession, he must have a client, and that client could only be the Department. Born out of these worries, he emphasised to me that his employment card was stamped on the basis that he was a self-employed man. Since Mr. Clinch has a separate profession in any case, I cannot see why this situation should not continue. Nor, indeed, assuming that it does not, can it be on the basis that he is, whilst acting as an Inspector, actually employed. Of course, for this purpose it is conceivable that he might be deemed to be employed, but this would be merely a statutory fiction. Similarly, he submitted that he had no contract of service and was never issued with terms of service under the Contracts of Employment Act 1963. This appears to me to be a confirmation of, rather than any detraction from, the proposition that he is not employed and holds an office, rather than the reverse. B C D

I am very conscious, of course, that I am differing from the views of the General Commissioners, but the point at issue is to some extent a novel one and is undoubtedly a difficult one, and the light shed by authority is but fitful. I think, however, I have perceived where the path lies, and I propose to follow it by allowing the appeal of the Crown. E

Appeal allowed. The Crown did not seek costs.

The taxpayer's appeal was heard in the Court of Appeal (Buckley, Ackner and Oliver L.J.J.) on 17 and 18 April 1980 when judgment was reserved. On 9 May 1980 judgment was given unanimously against the Crown, with costs. F

Michael Nolan Q.C. and *John Gardiner* for the taxpayer.

Brian Davenport Q.C. and *R. Aikens* for the Crown.

Graham v. White 48 TC 163; [1972] 1 WLR 874 was cited in argument in addition to the cases referred to in the judgments. G

Buckley L.J.—This is an appeal from a decision of Walton J. on 29 November 1978 whereby he allowed an appeal from a decision of the General Commissioners for Income Tax who had held that the taxpayer, Mr. Clinch, had been incorrectly assessed to income tax under Schedule E for the years 1973–74 and 1974–75 in respect of fees which he had earned in those years by conducting public local inquiries in respect of matters such as compulsory H

A purchases for which the Secretary of State for the Environment was responsible. The question is whether the taxpayer should have been assessed in respect of these fees under Schedule E or under Schedule D, Case II.

The facts are set out in the Case Stated and I need not recapitulate them. It is sufficient to say that the taxpayer is a civil engineer by profession and that he was in each of the relevant two years, and had been for some time previously, one of a panel of persons whom the Secretary of State from time to time invited to conduct independent public inquiries and to make reports thereon. When so invited the taxpayer was under no obligation to accept the nomination. He was remunerated for these services exclusively by fees on a daily basis. He was solely responsible for the conduct and procedure at any inquiry which he was appointed to conduct, subject to the rules governing tribunals and inquiries. Until the year 1973–74 the taxpayer was assessed in respect of such fees under Schedule D, Case II. In the two years in question, however, he was assessed in respect of such fees (apparently without any previous warning) under Schedule E. It seems that assessment under Schedule E may prove disadvantageous to the taxpayer on a number of grounds, due in part to the fact that assessments under Schedule E are made upon the receipts for the current year, whereas assessments under Schedule D are made on earnings of the previous year.

The charge to tax under Schedule E is now contained in the Income and Corporation Taxes Act 1970, s 181, which provides, so far as relevant to this case, that tax under Schedule E shall be charged in respect of any office or employment on emoluments therefrom. The charge to tax under Schedule D is to be found in s 108 of the Act which, so far as presently relevant, provides that tax under Schedule D shall be charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere, and all other annual profits or gains not charged under Schedule A, B, C or E and not specially exempted from tax. If the fees with which we are concerned are chargeable under Schedule E as emoluments of an office or employment they are excluded from Schedule D. It is not suggested that they were emoluments of an employment for the purposes of Schedule E. Consequently the sole question is whether the fees were emoluments of an office. The answer to this question must depend upon the meaning to be attributed to the word “office”.

G We have been referred by Counsel to a number of authorities in which over the years the meaning to be given to that word has been considered, starting with *Great Western Ry. Co. v. Bater*(¹) 8 TC 231 and ending with *Commissioners of Inland Revenue v. Brander and Cruickshank*(²) 46 TC 574. These cases have been decided at various stages of the history of legislation relating to income tax. Mr. Davenport, relying on what was said by Lord Wilberforce in *Farrell v. Alexander* [1977] AC 59, at pages 72E–73C, has submitted that the Act of 1970 should be construed without recourse to legislative antecedents and decisions upon earlier Acts. Lord Wilberforce said that

I “self-contained statutes, whether consolidating previous law or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when

(¹) [1922] AC 1.

(²) [1971] 1 WLR 212; 1971 SC (HL) 30.

there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve.” A

The question for decision in *Farrell v. Alexander*⁽¹⁾ was, it seems to me, of a very different character from the question which we have to consider. The question was whether the words “any person” in the Rent Act 1968, s 85, should be construed as limited to the landlord. To do so was to limit very wide words to a very narrow application. This was sought to be achieved by reliance upon decisions upon earlier Acts of Parliament. In the present case we are faced with the problem of putting a meaning upon an ordinary word in the English language, which has been used over a long period in income tax legislation. The courts have from time to time had to consider the proper meaning to be attributed to that ordinary English word in that legislation. It is not, in my judgment, in conflict with the principle enunciated by Lord Wilberforce to look at past decisions to discover what the courts in the past have thought to be the appropriate meaning to attribute to that ordinary English word. In doing so, however, we should guard ourselves against treating as authoritative decisions which were reached for reasons which my no longer be appropriate. B C

The word “office” has a wide variety of meanings in our language and is certainly not a term of art in our law. It is not, in my view, a term which is free from ambiguity. The Income and Corporation Taxes Act 1970 contains, and its predecessors have contained, no definition of “office”. We have to discover what meaning is most appropriately applied to it in Schedule E. Of the meanings attributed by the Oxford English Dictionary to the word the following comes nearest to the sense of the present case: “A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority, or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc.”. This appears to me to indicate, if any such clarification were necessary, that the office is something which is distinct from the holder of the office. D E F

Before proceeding further, it may perhaps be helpful if I say, as shortly as I may, something about the history of the charge under Schedule E. The familiar arrangement classifying income under Schedules A, B, C, D and E was first adopted in the year 1803. The income tax was abolished in 1816, but revived in 1842 on the same general lines as before 1816. Under Schedule E of that Act—that is, the Act of 1842—the tax was charged (by Rule 3) “on all public offices and employments of profit of the description hereinafter mentioned”. There then followed a long catalogue of public offices, ending with the words “and every other public office or employment of profit of a public nature”. Under subsequent rules the tax was to be deducted at source, and by Rule 1 it was provided that assessments should be for a whole year without any new assessment notwithstanding any change in the occupancy of the office. This scheme of assessment, with some verbal alterations, continued in force until 1956. Many amendments followed, year by year, from 1843 until 1918 when the first consolidating Act was passed. By the Income Tax Acts 1918 and 1952 tax was charged under Schedule E in respect of “every public office or employment of profit”. Under Schedule D tax was charged in respect of annual profits or gains arising or accruing from (*inter alia*) “any trade, profession, employment or vocation”. By the Finance Act 1922, s 18(1), profits or gains arising or accruing from an employment which under the Act of 1918 would have been chargeable to tax under Schedule D (i.e., non-public G H I

(1) [1977] AC 59.

- A employment) were transferred to Schedule E. By the Finance Act 1956, s 10, Schedule E was amended to charge to tax emoluments from "any office or employment" omitting the word "public". That is the language still to be found in s 181 of the Act of 1970. It will be seen that the only change which has taken place in the use of the word "office" is that, whereas in the Acts of 1842 and 1918 there were references to "any public office", since 1956 the language has been "any office". This is not, in my opinion, a difference of any significance in respect of the meaning to be given to the word "office". There have, however, been considerable changes in the context afforded by the provisions of the statutes from time to time in force.

- Before considering the authorities which bear on this question, I may perhaps be allowed to say in what sense, unguided by authority and without attempting to formulate a precise definition, I should be inclined to understand the word "office" as used in Schedule E. An "office" in this context is, in my opinion, a post which can be recognized as existing, whether it be occupied for the time being or vacant, and which, if occupied, does not owe its existence in any way to the identity of the incumbent or his appointment to the post. It follows, I think, that the office must owe its existence to some constituent instrument, whether it be a charter, statute, declaration of trust, contract (other than a contract of personal service) or instrument of some other kind. It also follows, in my view, that the office must have a sufficient degree of continuance to admit of its being held by successive incumbents: it need not be capable of permanent or prolonged or indefinite existence, but it cannot be limited to the tenure of one man, for if it were so it would lack that independent existence which to my mind the word "office" imports. It may be that it should in some degree possess a public character, but it is necessary to decide that point in this case, for the taxpayer's functions in respect of which the fees were received undoubtedly had such a character.

- In *Great Western Ry. Co. v. Bater*⁽¹⁾ 8 TC 231, the question for decision was whether a Mr. Hall, who was employed as a clerk by the Great Western Ry. Co., could properly be said to hold a public office. Rowlatt J. referred to the fact that under Rule 1 of the Act of 1842 the assessment in respect of the emoluments of an office was to be made for a year in respect of the office and that it was to be in force for a whole year and levied without any new assessment notwithstanding that a change of person having or exercising the office or employment had taken place in the course of the year. He expressed his own personal view in the following terms⁽²⁾:

- "Now it is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment, which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound. I am not going to decide that, because I think I ought not to in the state of the authorities, but my own view is that the people in 1842 who used this

(1) [1922] AC 1.

(2) 8 TC 231, at p 235.

language meant by an office a substantive thing that existed apart from the holder.” A

When the case reached the House of Lords the House adopted Rowlatt J.’s view. Lord Atkinson (at page 246) said that he fully concurred in the passage which I have read from Rowlatt J.’s judgment. Lord Sumner said that in his opinion Mr. Hall’s situation was not an office or an employment of profit and that no one would think of calling it so; it enjoyed neither publicity nor continuity; and it was not distinguishable from that of the engine driver in any respect that falls within the meaning of Schedule E⁽¹⁾. It is true that the noble and learned Lords who sat upon that case did pay attention in their speeches to the machinery of assessment prescribed by Schedule E of 1842. This was partly due to the fact that they were concerned to decide whether Mr. Hall’s post could be considered to be a “public office” within the meaning of Schedule E of 1842, for those were the words to be construed; but I do not think their consideration of that question can be satisfactorily divorced from the views which they expressed about the character of an “office”. I would consequently accept that that decision should be regarded as coloured by the form of the legislation then in force. B C

The next case for consideration is *McMillan v. Guest*⁽²⁾ 24 TC 190, which was a decision upon Schedule E of 1918. The question in that case was whether a non-executive director of a private limited company was assessable under Schedule E on his remuneration as a director upon the footing that he held a “public office”. Lawrence J. held that the taxpayer was not liable under Schedule E. His decision was reversed in this Court, whose decision was affirmed in the House of Lords. In this case, it seems to me, the House of Lords addressed itself to the question how the word “office” should be understood in the ordinary sense of language without regard to legislative history. Lord Atkin (at page 201) said: “It is necessary to consider whether the Appellant (1) held an office, (2) held a public office, (3) held a public office within the United Kingdom.” He answered the first question in the following terms: D E

“On the first point there was no dispute. There is no statutory definition of ‘office’. Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt, J., in *Great Western Railway Co. v. Bater*⁽³⁾. . . adopted by Lord Atkinson in that case⁽⁴⁾. . . as a generally sufficient statement of the meaning of the word: ‘an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders’. There can be no doubt that the director of a company holds such an office as is described.” F G

Lord Wright (at page 202⁽⁵⁾) said:

“The word ‘office’ is of indefinite content; its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for the purposes of this case the following: ‘A position or place to which certain duties are attached, especially one of a more or less public character.’ This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular *Great Western Railway Co. v. Bater*, . . . where the legal construction of these words which had been in Schedule E since 1803. . . was discussed.” H I

(1) 8 TC 231, at p 254.

(2) [1942] AC 561.

(3) 8 TC 231, at p 235.

(4) *Ibid.*, at p 246.

(5) 24 TC 190.

A Later (at page 203) he said⁽¹⁾:

“I do not attempt what their Lordships did not attempt in *Bater's* case⁽²⁾, that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense, with due regard to the requirement that there must be some degree of permanence and publicity in the office.”

B

Upon this point Lord Porter contented himself with saying (at page 206): “That it is an office is, I think, plain. It has permanency apart from the temporary holder and is held in one of the specified corporations.” Lord Roche agreed with Lord Atkin.

C In *Mitchell and Edon v. Ross*⁽³⁾ 40 TC 11, decided under the Income Tax Act 1952, the question was whether a taxpayer who had been appointed to be a part-time consultant with a regional hospital board was assessable in respect of the profits or gains arising from that appointment under Schedule D or under Schedule E. Upjohn J. decided that they fell to be assessed under Schedule E, and his decision on that point was affirmed by the Court of Appeal. In the course of his judgment Lord Evershed M.R. placed reliance upon the terms of the National Health Service Act 1946 which required the Minister to appoint consultants and upon the fact that the respondent's appointment as a part-time consultant was made by the regional hospital board under powers delegated to them under that Act by the Minister. He also relied upon the terms of the contract between the taxpayer and the regional hospital board. He referred to *Great Western Ry. Co. v. Bater* and to *McMillan v. Guest*⁽⁴⁾ and held that the taxpayer's appointment clearly satisfied the test indicated by those citations. Pearce L.J. agreed that it was clear that the respondent's appointment was an office. Harman L.J. also agreed, saying⁽⁵⁾: “An office is a position or post which goes on without regard to the identity of the holder of it from time to time as was said, in effect, by Rowlatt, J. in *Great Western*

D *Railway Co. v. Bater*. . . and approved by Lord Atkin in *McMillan v. Guest*.” The case went to the House of Lords but on another point. In the House of Lords Counsel for the taxpayer conceded that the case fell within Schedule E. Viscount Simonds (at page 56) said that in his opinion the concession was rightly made and that the opposite view was not arguable. Lord Radcliffe (at page 60) said that he entirely agreed with Upjohn J., who had held at first instance that the taxpayer's appointment was a public office.

E

F

G The last of this series of authorities to which I must refer is *Commissioners of Inland Revenue v. Brander & Cruikshank*⁽⁶⁾ 46 TC 574, decided under the Act of 1956. That case related to a Scottish firm of advocates who also acted as secretaries and registrars to a number of companies. Two of the companies were taken over and in consequence the taxpayers lost their positions as secretaries and registrars with those companies and received a sum of £2,500 by way of compensation. If this sum were a receipt of the taxpayers' profession as advocates it was taxable under Case II of Schedule D. If on the other hand it were an emolument of an office which, if taxable at all, would be taxable under Schedule E, it was exempt from tax under the Finance Act 1960, s 38(3). The Special Commissioners held that the taxpayers' appointments as registrars were “offices” and that accordingly the case fell within Schedule E and not Schedule D, and that consequently the taxpayers were exempt from

(1) 24 TC 190.

(2) 8 TC 231.

(3) [1962] AC 813.

(4) 24 TC 190.

(5) 40 TC 11, at p 49.

(6) [1971] 1 WLR 212, 1971 Sc(HC)30.

tax. The Court of Session upheld that decision and the House of Lords affirmed the decision of the Court of Session. Lord Morris of Borth-y-Gest (at page 589) drew attention to the fact that the Companies Act made it necessary that the performance of the statutory duty of maintaining a company's register should be assigned to someone. He held that the Special Commissioners were warranted on the facts as found in holding that the appointments in question were appointments to offices. He said⁽¹⁾:

“Even though the Companies Act does not require that there should be an appointment as registrar, a company must arrange that some person or persons should on its behalf perform the statutory duties of maintaining its register. In doing so, it may establish a position which successively will be held by different persons. If it does so the company may have created what could rationally for income tax purposes be called an office.”

Lord Guest (at page 591) concurred in the view that the post of registrar was an “office” within the meaning of Schedule E, and Lord Donovan (at page 594) said that he did not think it possible to say that as a matter of law the Commissioners were disentitled to take the view that each registrarship was an office within the meaning of the Schedule. In so holding the Commissioners had founded themselves on the decision in *McMillan v. Guest*⁽²⁾.

We were also referred to the decision of Rowlatt J. in *Davies v. Braithwaite*⁽³⁾ [1931] 2 KB 628, relating to the theatrical earnings of the late Dame Lilian Braithwaite. For my part I derive little assistance from that decision.

These decisions were, of course, decisions on the particular facts of each case and related to a variety of statutory provisions in force from time to time. Nevertheless, even if they should not be regarded as binding on us in the present case, they clearly constitute a body of very highly persuasive authority upon the sense to be put on the word “office” in a Schedule E context. They appear to me to give strong support to the personal view which I formulated earlier in this judgment on the meaning to be attributed to the word for present purposes and I find in them nothing to prompt me to qualify that view. In particular I would draw attention to the frequent references to the characteristic of continuance.

The Crown throughout this case maintained that on each occasion when the taxpayer was invited to conduct a public enquiry he was appointed to a separate office, which continued until his functions in relation to that inquiry were fully discharged, whereupon that office came to an end. Walton J. felt impelled to accept that view by our considerations⁽⁴⁾. Although, no doubt, in fairness to the learned Judge these four considerations should be considered collectively as cumulative indications of the existence of a series of offices, I will comment on each in turn.

The first of these four considerations is “that the Inspector has no employer”. This must, I think, stem from what was said by Lord Normand in *Dale v. Commissioners of Inland Revenue*⁽⁵⁾ 34 TC 468, at page 490. The question in that case was whether the late Sir Henry Dale as a trustee of the will of the late Sir Henry Wellcome, under which he received an annuity for so long

(1) 46 TC 574.

(2) 24 TC 190.

(3) 18 TC 198.

(4) Page 376 *ante*, [1979] 1 WLR 338.

(5) [1954] AC 11.

A as he remained a trustee of the will, held "an office of profit" within the Income Tax Act 1918, s 14(3). Lord Normand said:

"The first point to consider is whether trusteeship is within the ordinary sense of the word an 'office', and on this I can only say that 'office' is an apt word to describe a trustee's position or any position in which services are due by the holder and in which the holder has no employer."

B The holders of innumerable offices, no doubt, owe duties and have no employer, but it cannot, in my opinion, be accurate to say that anyone who owes duties but has no employer is the holder of an office. All sorts of self-employed persons undertake obligations to perform duties in the course of their self-employment without having any employer. For example, many professional men such as accountants, architects or solicitors undertake duties to their clients, but could not properly be said to have any employer or to be the holders of offices. Moreover, the converse also would, I think, be untrue. I feel fairly confident that one could find many holders of what would certainly be accepted as being offices in ordinary parlance who do so under a contract of service.

C The second consideration referred to by the learned Judge was the following: "that the person who conducts the inquiry is the person appointed, the Inspector, and not Mr. Clinch considered as a person. Without the appointment having first been made, his acts would be wholly nugatory." No doubt the acts of anybody who purported to conduct a public inquiry under the Acquisition of Land (Authorisation Procedure) Act 1946 without having been appointed to do so would be nugatory, but in any case in which a person appointed to conduct such an inquiry does so I see no basis for saying that he acts otherwise than in the capacity of an individual so appointed. The title "Inspector" has no countenance under the Statute. It is a term of convenience frequently used to describe a person appointed to conduct a public inquiry, but nothing more. The relevant paragraph of Sch 1 to the Act refers merely to "a person appointed by the confirming authority for the purpose", i.e., for the purpose of conducting a public local inquiry (Sch 1, para 4(2)). Anyone who is so appointed is invested with authority to conduct the inquiry in such way as he thinks fit subject to the Regulations contained in the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967 which describe him merely as "the appointed person". With deference to the learned Judge, I see no justification for treating the person so appointed as having any status distinct from his status as a person selected by the Minister to carry out the particular task.

H The third consideration was "that the duty placed on the Inspector was one which was placed by statute". This is true, and if the other criteria for the existence of an "office" were present, this might well be a relevant consideration.

I The final consideration referred to by the learned Judge is this: "that in the event of the person originally appointed not for any reason carrying out the duties placed upon him, the only method of procedure (apart from abandoning the proposed inquiry altogether) would be to appoint another Inspector." As I understand the position, in the event of a person appointed to conduct a public inquiry being unable or unwilling for any reason to complete the task, there would be no question of another person being appointed in his place to carry on from the point which the inquiry had reached: it would be necessary to start a new inquiry from the beginning. The second appointment would not take effect in any sense in succession to the first.

For these reasons these four points do not have the same persuasive force for me as they had for the learned Judge. A

Mr. Davenport, on behalf of the Crown, pressed upon us the public nature of the duties undertaken by anyone who is appointed to conduct a public inquiry. This is in effect the learned Judge's third significant consideration. Mr. Davenport stressed that, although these duties stem from the appointment of the individual appointed to conduct the inquiry and relate exclusively to that inquiry, they are statutory duties of a quasi judicial and public character. That the duties are statutory and that they are of a public character cannot be denied. Nevertheless I for my part cannot regard these characteristics alone as sufficient to constitute the appointment an appointment to an "office". There was no continuity about the taxpayer's position as a person appointed from time to time to conduct public inquiries. Each appointment was distinct from all the others and was effective only for the purpose of the particular inquiry to which it related. So soon as that inquiry was completed by the taxpayer making his report, the appointment was spent. Had the taxpayer for any reason failed to complete his assignment as the person charged with responsibility of conducting a particular inquiry and reporting on it, the appointment would have lapsed; no one would or could have been appointed to complete that particular assignment; it would have become necessary to embark upon a new inquiry and to appoint a new appointed person for the purpose of that new inquiry. So each appointment was personal to the taxpayer; it lacked the characteristic of independent existence and continuance which, in my judgment, is one of the essential characteristics of an "office". E

These considerations lead me to a different conclusion from that reached by the learned Judge. In my judgment the taxpayer did not hold any "office" within the meaning of Schedule E in respect of any of the public inquiries which he was appointed to conduct. The emoluments which he earned by reason of those appointments fall, in my judgment, to be assessed under Schedule D. I would consequently allow this appeal. F

Ackner L.J.—The question which this appeal raises is: what is an "office" within the meaning of s 181 of the Income and Corporation Taxes Act 1970? For many years the Appellant, and those like him, who were appointed by a Minister to hold from time to time a public local inquiry, were not treated by the Revenue as holding an "office" within the meaning of that section and thus falling under Schedule E, Case I, as distinct from carrying on a profession or vocation falling within Case II of Schedule D—s 109(2) of that Act. G

However, suddenly without any prior warning to the Appellant, the Revenue, in the words of Walton J.; behaving in an extremely insensitive way, changed their practice and subjected the Appellant to the PAYE provisions of s 204 of the Act and the regulations made thereunder. This of course is not the only disadvantage resulting from being taxed under Schedule E. Without going into any detail, such a basis of taxation, when imposed upon a person who is otherwise taxed under Schedule D, can give rise to "peaks and troughs" problems; that is, unreal fluctuations in income with resultant tax disadvantages; it can create anomalies in relation to the charging of expenses; and on retirement it can create added complications to the already complicated situation, resulting from the Schedule D basis of taxation being that of the preceding year of assessment. Were the Revenue correct in their second H I

A thoughts? The General Commissioners thought that they were wrong and Walton J. thought that they were right.

There is no statutory definition of the word "office" but the courts have time and again treated the words of Rowlatt J. in *Great Western Ry. Co. Ltd. v. Bater*⁽¹⁾ in 1922 as a generally sufficient statement of the meaning of the word (see in particular *McMillan v. Guest*⁽²⁾ [1942] AC 561, *per* Lord Atkin, at page 564). The expression used by Rowlatt J. was⁽³⁾: "A subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders." Lord Wright in *McMillan's* case, in resisting an exact definition of the word, chose from the four columns of the New English Dictionary the following as the most relevant⁽⁴⁾: "a position or place to which certain duties are attached, especially one of a more or less public character". He took the view that this roughly corresponded with such approaches to a definition as had been attempted, in particular in *Bater's* case. He added however, that the word has to be construed in relation to the facts of the particular case⁽⁵⁾, "according to the ordinary use of language and dictates of common sense, with due regard to the requirement that there must be some degree of permanence and publicity in the office."

In the most recent of the cases, *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁶⁾ in 1970, the Crown contended that the compensation of £2,500 received on termination of the respondent's appointments as registrars of two companies, was a trading receipt and therefore should have been included in the firm's profits assessable under Case II of Schedule D. The appointments, they contended, were like agencies and not offices or employments under Schedule E. Lord Guthrie in the Court of Session, having referred to Rowlatt J.'s *dictum*, said, at page 584 A:

"What the Special Commissioners had to decide was whether in the particular cases of the two companies the Respondents were holders of substantive positions to which duties were attached, and which had the quality of permanency irrespective of the particular holder's tenure, or whether they merely did some work of a particular kind for the companies."

Lord Migdale, who also referred to the same *dictum*, observed, at page 587A: "This work of keeping the registers entailed a position which had an existence of its own. If one holder gave it up some one else had to be appointed to carry it on." The Court of Session accordingly held that the registrarships were "offices", and that those offices were not assets of the respondent's business assessable under Schedule D. That decision was upheld by the House of Lords. Lord Morris of Borth-y-Gest, at page 589B, said:

"A duty is imposed upon a company to keep a register of members; Companies Act 1948, s 110. Even though the Companies Act does not require that there should be an appointment as registrar, a company must arrange that some person or persons should on its behalf perform the statutory duties of maintaining its register. In doing so, it may establish a position which successively will be held by different persons. If it does so the company may have created what could rationally for income tax purposes be called an office."

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(1) 8 TC 231; [1922] AC 1. (2) 24 TC 190, at p 201. (3) 8 TC 231, at p 235.
 (4) 24 TC 190, at p 202. (5) *Ibid*, at p 203.
 (6) 46 TC 574; [1971] 1 WLR 212; 1971 SC (HL) 30.

Lord Morris of Borth-y-Gest then referred to *McMillan v. Guest*⁽¹⁾, where Lord Atkin was prepared to accept Rowlatt J.'s *dictum* in the *Bater* case⁽²⁾, as adopted by Lord Atkinson when that case went to appeal as being a generally sufficient statement of the meaning. He also referred to Lord Wright's observations in the self-same case, to which I have earlier made reference. A

The Appellant was, because of his qualifications and experience as a chartered civil engineer, invited from time to time by the Department of Environment to hold a public local inquiry where objections had been entered to a proposed compulsory purchase order. The Department was given power under the Acquisition of Land (Authorisation Procedure) Act 1946 to appoint a person to hold such an inquiry. The Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967, made under the provisions of s 7A of the Tribunal and Inquiries Act 1958, prescribe the procedures to be followed at such public local inquiries. When it became necessary to hold such a public local inquiry, the Appellant would be contacted by telephone by a Department official who would inform him of the location and date of the inquiry, and the daily fee payable, and would invite the Appellant to undertake the inquiry. The Appellant then had complete discretion whether to accept or refuse the invitation. He was solely remunerated by such daily fees according to the length of the inquiry and received no retainer or salary. Payment was made by the Department only in response to a fee account submitted by the Appellant. He did, however, receive travelling and subsistence allowance on Civil Service scales. No statement of "Terms of Employment" under the Contracts of Employment Act 1963 was ever served upon him and no question of redundancy payments arose on the completion of an inquiry. On acceptance of the invitation, the Appellant would have forwarded to him the papers relevant to the inquiry together with an authority in writing, signed on behalf of the Secretary of State, appointing him to hold the particular inquiry. Thereafter he held an independent public inquiry without direction or guidance from the Secretary of State and always announced his independent status at the commencement of the inquiry. The Appellant was solely responsible for the conduct and procedure at such an inquiry, subject to the rules governing tribunals and inquiries. If the Appellant became ill, or had some urgent business to attend to, during the progress of the inquiry, he could ask to be released from his engagement. The Department, if it consented to his release, would then find some other inspector, as it so described the appointment, and a fresh inquiry would have to take place. The Appellant stamped his own insurance card as a self-employed person. B C D E F G

At the hearing of the taxpayer's appeal before the General Commissioners against the Revenue's decision, the Inspector of Taxes accepted that the "office", as he so contended was the status of this engagement, subsisted from the date when the appointment was made to the date when the report of the inquiry was delivered to the Secretary of State. He contended that each such office was a separate office within the meaning of s 181(1) of the Act. The General Commissioners, whose attention was drawn to the relevant authorities, found that the Appellant's appointment was a "transient, indeterminate, once only execution of a task, for which he was peculiarly qualified". They concluded that the Appellant's discharge of the duties of an inspector holding a public local inquiry did *not* amount to the holding of an office within the meaning of Case I of Schedule E; Clearly the General Commissioners reached their conclusions because of the lack of permanence and the lack of continuity H I

(1) 24 TC 190.

(2) 8 TC 231.

A of the engagement. Walton J. reversed the General Commissioners' decision. He was of the opinion that the authorities to which his attention was drawn, in particular *Bater's*⁽¹⁾ and *McMillan's*⁽²⁾ cases, provided only "slight guidance". He concluded that there would not be the slightest doubt that a person appointed to conduct an inquiry under the 1946 Act holds an office save for two matters to which I shall refer shortly hereafter. The factors which in his view would otherwise make the conclusion inevitable were:

B 1. "That the Inspector has no employer." Mr. Nolan on behalf of the Appellant rightly points out that of course neither does a self-employed man, which was undoubtedly the status of the Appellant.

C 2. "That the person who conducts the inquiry is the person appointed, the Inspector, and not Mr. Clinch considered as a person. Without the appointment having first been made his acts would be wholly nugatory." But the person who conducts the inquiry is the Appellant considered as a person. He owes his appointment to the particular skill and/or experience which he has. Of course he would have no *locus standi* without the formal appointment first being made, but then the same would equally apply to an arbitrator, who Mr. Davenport for the Crown concedes, is not appointed to an "office".

D 3. "That the duty placed upon the Inspector was one placed by statute." I take this to mean that once having accepted the appointment, then the Appellant's conduct of the public local inquiry was, to some extent, controlled and circumscribed by the Statutes to which I have made reference. Again I cannot see any great significance in this point, since equally an arbitrator's conduct of an arbitration is controlled and circumscribed to some extent by the Arbitration Acts and by the courts. The obligation to observe statutory requirements cannot in itself create an office.

E 4. "That in the event of the person originally appointed not for any reason carrying out the duties placed upon him, the only method of procedure (apart from abandoning the proposed inquiry altogether) would be to appoint another Inspector." This statement is not strictly accurate, since if the person originally appointed does not carry out the duties placed upon him, the proposed inquiry has to be abandoned and another Inspector has to be appointed. But this equally applies to any other engagement of a professional character.

The first of the two matters which caused the learned Judge some hesitation were as follows⁽³⁾:

G "That, in complete contradistinction to the description of an office given by Rowlatt J... the so-called 'office' here was of a merely temporary nature: it was the reverse of permanent, in that once his report had been delivered he was *functus officio* and that was the end of the inquiry."

H The learned Judge, however, concluded that it was not a proper use of authority "to wrench a statement such as that made by Rowlatt J. out of context". In the learned Judge's view the context in which he was making that statement was in relation to who might conceivably be, and who might not conceivably be, the holder of a public office in a railway company. But in my judgment there was no wrenching of the words out of context. The learned Judge's attention was not directed to *Davies v. Braithwaite*⁽⁴⁾ in 1931. The case

I (1) 8 TC 231.

(2) 24 TC 190.

(3) Page 376 *ante*.

(4) 18 TC 198; [1931] 2 KB 628.

concerned the question as to whether Miss Lilian Braithwaite, the well-known actress, ought to have been assessed under Schedule D of the Income Tax Act 1918, as following her profession as an actress, or whether she ought to be assessed under Schedule E as exercising certain employments under the particular engagement which she made. At the outset of his judgment Rowlatt J. explained the requirement of a degree of permanence. He said⁽¹⁾: “The scheme of the Income Tax Acts used to be to include under Schedule D ‘profession employment or vocation’.” That was held to be a fairly comprehensive definition of persons who carried on business on their own account. Under Schedule E were public offices. It was recognized that where a person was in a permanent situation it was much better to assess his salary as the salary of the situation than go to him personally and assess him in respect to his earnings. There were persons like railway clerks, who were hired for an indefinite period. For the purposes of assessment to income tax they were treated as holders of offices. That was a very convenient method of assessment to income tax. Then a case arose (*Great Western Ry. v. Bater*⁽²⁾) in which I pointed out that these railway clerks were not holders of offices at all. I said that my own view was that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from its holder. It was something which had an existence independent of the person who filled it. It was something which was held by a tenure and title rather than by contract and which continued to exist, though the holders of it might change and it was filled in succession by successive holders. The House of Lords decided that my view was right. It was therefore found convenient to put employment expressly in Schedule E.

He further stated (pages 635–6⁽³⁾) in relation to Miss Braithwaite’s activities:

“But I would go further than that and say that it seems to me that where one finds a method of earning a livelihood which does consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other—and in the case of an actor’s or actress’s life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining first one engagement, then another, and a whole series of them—then each of those engagements cannot be considered an employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments.”

Clearly to my mind, the learned Judge was stressing, as did Lord Wright, the need for some degree of permanence. This feature is, in my judgment, reflected in the requirement of continuity. Thus an office is a position or post which goes on without regard to the identity of the holder of it from time to time, as Harman L.J. summarised the effect of Rowlatt J.’s observations in the *Bater* case.; (See *Mitchell and Edon v. Ross*⁽⁴⁾), a case concerning medical specialists who were appointed as part time consultants under the National Health Service and also had private patients).

The other point was that in the cases to which Walton J. had made reference the persons found to be holding an office had a steady remuneration

(1) 18 TC 198, at p 202; [1931] 2 KB 628, at p 633.

(2) 8 TC 231.

(3) [1931] 2 KB 628; 18 TC 198, at p 204.

(4) 40 TC 11; [1962] AC 813.

A therefrom, whereas an Inspector was paid by means of fees calculated so as to reflect the time which had been spent on the discharge of his duties after the appointment. I agree with the learned Judge that the mere method of calculation of the remuneration has little bearing on the question as to whether the person receiving it is or is not holding an office.

B I return to the character of the appointment by the Minister of the Appellant. It was a temporary *ad hoc* appointment confined to the Appellant. He was not appointed to a position which had an existence of its own. It had no quality of permanency about it. It was conceded that it subsisted only from the date when he was appointed to the date when the report of the inquiry was delivered to the Secretary of State. It was, as the General Commissioners correctly observed, a transient indeterminate once only execution of a task for which the Appellant was peculiarly qualified.

C While I of course accept that Rowlatt J.'s statement of the meaning of "office" has not the precision of a definition, the frequency with which it has been approved as a generally sufficient statement, gives it the status of an important guide to the construction of the word. The appointment of the Appellant fails in virtually every aspect to meet its requirements. Moreover, adopting the approach of Lord Wright and construing the word in relation to the facts of the particular case according to the ordinary use of language and the dictates of common sense, with due regard to the requirement that there must be some degree of permanence, I would equally hold that the Appellant has been wrongly assessed under Schedule E. Accordingly I, too, would allow this appeal.

E **Oliver L.J.**—Section 181 of the Income and Corporation Taxes Act 1970 taxes under Schedule E the emoluments from any office or employment. It is common ground that Mr. Clinch, the Respondent to the Crown's appeal from the General Commissioners, was not at any material time in anybody's employment. The Crown claim, however, that he held an office—or to be exact, a series of offices, the office in each case being that of a person appointed by the Secretary of State for the Environment to hold an inquiry into objections made to a particular compulsory purchase order. Mr. Clinch was, no doubt, engaged to make the inquiry in each case because the Secretary of State considered that his particular professional expertise—that of a civil engineer—made him a person peculiarly suited to conduct such an inquiry and to report to the Secretary of State his opinion as to the validity or otherwise of the objections. The Secretary of State has been in the habit for some years of engaging the services of Mr. Clinch to carry out inquiries of this nature. Mr. Clinch is one of a number of suitably qualified people whose names are on a panel kept by the Department as persons willing and available to do this type of work. As and when an inquiry requires to be held, an approach is made by the Department to one or more persons who are members of the panel and who appear suited to the particular inquiry. The member is asked whether he will be willing to undertake it. He is told the general nature of it, the time it is likely to occupy and the amount of the daily fee. There is, apparently, no fixed or statutory scale, although no doubt the Department has its own internal limits upon what can be offered. Membership of the panel imports no duty to accept. That is a matter entirely for the member's discretion, but assuming that he is available, is satisfied with the daily fee offered and notifies his acceptance, the necessary papers will be forwarded to him together with a formal notification that the Secretary of State has appointed him, pursuant to the statutory powers, to hold the inquiry. Travelling and subsistence

allowances on Civil Service scales are paid to him, but payment of the daily fees for the inquiry will be made by the Department only when the person appointed submits his account. Up to the fiscal year 1973–74 the fees which Mr. Clinch received in this way were returned by him as part of the receipts of his profession as a civil engineer and were taxed accordingly under Schedule D, but the Revenue practice then changed and for the years 1973–74 and 1974–75 Mr. Clinch's receipts from this source have been assessed to tax under Schedule E. The matter is one of very considerable general importance, although it makes, I think, no or very little difference to the amount of tax which Mr. Clinch will have to pay in respect of the years in question. Mr. Clinch appealed against the assessments to the General Commissioners, claiming that the fees paid to him did not arise from an employment (which was conceded) and likewise did not arise from any office held by him. There was no question, of course, but that the receipts were taxable, the only question being whether they were properly taxable under Schedule E. The General Commissioners upheld Mr. Clinch's contention that they were not, and from that the Inspector of Taxes appealed by way of Case Stated to the High Court, where Walton J. held that they were.

The statutory provisions under which the inquiries held by Mr. Clinch were conducted have already been referred to, so far as material, in the judgments already delivered and I will not take up time by reciting them in extenso. It is however worth noting that there is nothing in the Act of 1946 itself to indicate the machinery by which inquiries are to be made. There is no office of Inquirer or Inspector created by the Act but merely a provision authorising the Minister to "cause to be held" the appropriate inquiries. The way in which the person charged with the function of carrying out the inquiry is to be selected, engaged or remunerated is again entirely at large, and the manner in which he approaches and executes the task of inquiring and reporting is a matter which is left to his discretion except to the extent that he must follow the procedural requirements of the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967. It is here that we find the phrase "the appointed person", used to signify the person who has been requested to undertake and has accepted the task of carrying out the inquiry, but it does not, I think, have any significance beyond that of being a useful description. Such a person is commonly referred to as "the Inspector" but again this is not a term of art and it has no statutory foundation. The Income and Corporation Taxes Act 1970, unlike some of the earlier legislation limiting and defining the income assessable under Schedule E contains no internal guidance upon the meaning of the word "office". If one looks merely at the dictionary definition of the word—and the New Oxford Dictionary contains some eight senses in which it is used—one finds that it is so wide as to cover virtually any position entailing work for which a person is remunerated. That definition which is favoured by Mr. Davenport and by the learned Judge is⁽¹⁾

"A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc."

The difficulty about this as a guide to the interpretation of the Statute is that, if it is literally applied, it is apt to cover all sorts of posts which nobody in ordinary parlance would describe as "offices". Indeed it is difficult to imagine any position, however menial, to which there are not attached certain defined

(1) Page 375 *ante*.

A duties. Mr. Davenport, however, attaches great importance to the words “especially one of a more or less public character”, and whilst he disclaims any intention of treating “public character” as a touchstone, (rather than a badge which is commonly, although not universally, found) he stresses that the duty to hold an inquiry is a duty imposed by a public general statute, that it is of the essence of such an inquiry that it should be conducted in public, and that it falls to be conducted, to an extent at least, in accordance with regulations contained in a statutory instrument. Whilst, however, these features cannot be ignored, I am not, for my part, convinced that they carry the weight accorded to them by the learned Judge in his judgment. Many duties are laid on many bodies by statute and many of them fall to be performed publicly. But it does not at all follow from that that every person engaged to perform them is the holder of an “office”. A local authority has, for instance, a statutory duty to collect refuse but that does not, as it seems to me, elevate the corporation dustman to the status of an “officer” of the corporation, even though he performs his duties in public. Nothing, after all, could be more public than a dustcart. That the duties undertaken by the propositus are duties the performance of which is required by statute and are duties publicly performed constitutes, no doubt, a common feature of many positions to which, in ordinary parlance, the word “office” would be applied, but it is not and it cannot be conclusive, as, indeed, Mr. Davenport accepts. The secretary of a golf club holds, no doubt, an office in the club, but he performs no public or statutory duties at all.

E It seems to me that, as a matter of ordinary language the word “office” imports the concept—it may be an entirely artificial concept—of a position which exists quite independently of the person who is for the time being filling it. It connotes, I think, a degree of permanence in the sense not (or not necessarily) of something which goes on from generation to generation, but at least of not being co-terminous with the life or availability of a particular individual. Certainly this is a feature which is stressed in the cases decided under the predecessors of the Act of 1970.

G Mr. Davenport submits, however, that these earlier cases are of very limited help, for two reasons. In the first place, he refers to the passage in the speech of Lord Wilberforce in *Farrell v. Alexander*⁽¹⁾ which has already been quoted in the judgment of my Lord, Buckley L.J. In the instant case, Mr. Davenport submits, the classical method of construction—that is, to look for the ordinary meaning of the word—does enable the Court to arrive at a solution and there is not only no need, but it is not strictly permissible to look at the sense in which the word was construed under earlier legislation, which not only was not in the *ipsisissima verba* of the 1970 Act, but which was enacted against the background of a radically different system of tax collection. But this seems to me to be very much a case where the classical methods of construction do not, in fact, easily produce a certain result and I find some difficulty in accepting the Crown’s submission that an expression whose ordinary meaning has given rise to so much debate is free from ambiguity.

I It is fair to say, however, that the earlier cases in which the word has fallen to be construed do require to be approached with a degree of caution. Prior to 1922 tax under Schedule E was charged “in respect of every *public* office or employment of profit” and it was charged on the “salaries, fees,

(1) [1977] AC 59.

wages, perquisites or profits...therefrom". Profits or gains arising from "any trade, profession, employment or vocation" were taxed under Schedule D, employments chargeable under other Schedules being excluded in Case II of Schedule D. Under s 18 of the Finance Act 1922 profits or gains from an office, employment or pension previously charged under Schedule D ceased to be so chargeable and became chargeable under Schedule E. This has to be borne in mind in considering any decision prior to 1922 and the more so because the rules applicable to Schedule E then in force contained this important provision—a provision which continued in force until the Finance Act 1956. The rule is in these terms:

"Every assessment shall be made for one year, and the tax in respect thereof shall be levied for that year without any new assessment, notwithstanding any change in the holder of any office or employment; but if, during the year of assessment, any person chargeable quits the office or employment, or dies, he, or his executors or administrators, respectively, shall be liable for tax in respect of the period during which he held or exercised the office or employment, and my successor shall in like manner be liable in respect of the period during which he has held or exercised the same."

It seems that similar provisions appeared in the Act of 1842 and in *Great Western Ry. Co. v. Bater*⁽¹⁾, in which the court was called upon to decide whether a clerk in the employment of the Great Western Railway was the holder of a public office or employment, Rowlatt J. referred to those provisions.

"Now it is argued... he said⁽²⁾ "that that shews that what those who used the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders."

He expressed the view—which, for reasons which he then gave, he felt disintitled to hold—that by an "office" was meant "a substantive thing that existed apart from the holder". His actual decision was upheld in the Court of Appeal but reversed in the House of Lords. The passage to which I have referred in Rowlatt J.'s judgment was, however, approved by Lord Atkinson, but again it is significant that this was in the context of the rule quoted above. He referred particularly to the word "successor" and said⁽³⁾: "It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other." A similar emphasis is found in the speech of Lord Sumner.

The expression of Rowlatt J. quoted above was treated by Lord Atkin as generally a sufficient statement of the meaning of the word "office" in *McMillan v. Guest*⁽⁴⁾ in 1942 and in the same case Lord Wright observed⁽⁵⁾ that the statutory words "employment" and "office" were "to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense with due regard to the requirement that there must be some degree of permanence and publicity in the office." Again, however, Lord Wright may, in referring to "the" office rather than "an"

(1) 8 TC 231; [1922] 2 AC 1.

(2) 8 TC 231, at p 235.

(3) *Ibid*, at p 246.

(4) 24 TC 190; [1942] AC 561.

(5) 24 TC 190, at p 203.

- A office have had in mind that, for the purposes of the Statute, the word had to be construed in the light of the particular kind of office referred to in rule 2, which clearly does import a degree of permanence. The expression "office" again fell to be construed in 1959 in *Mitchell and Edon v. Ross*⁽¹⁾ a case which also, although decided after the elimination of rule 2 in the 1956 Finance Act, was dealing with assessments made under the pre-1956 legislation. Again
- B reference was made both by Upjohn J. and by the Court of Appeal to *Bater's case*⁽²⁾ and *McMillan v. Guest*.⁽³⁾ It is, however, fair to say that the fact that Rowlatt J. had expressed the view which was subsequently approved by the House of Lords with specific reference to rule 2 does not seem to have been treated in this case as a matter of significance. Harman L.J., for instance, was content simply to say that⁽⁴⁾ "an office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt J."

- The same approach can be found in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁵⁾ which was concerned with an assessment for the year 1967-68 and therefore with legislation in which the expression fell to be construed without reference to rule 2 in the form in which it had existed at the
- D time of the earlier decisions. Yet, again, both in the Court of Session and in the House of Lords what had been said by Rowlatt J. in *Bater's case* and by Lord Wright in *McMillan v. Guest* was adopted and approved. Lord Morris of Borth-y-Gest observed that a limited company had to arrange for someone to keep its statutory register and continued⁽⁶⁾: "In doing so, it may establish a position which successively will be held by different persons. If it does so the
- E company may have created what could rationally for income tax purposes be called an office." So here, once again, emphasis is laid upon the concept of continuance apart from the individual holder. This, as it seems to me, is something entirely lacking in the instant case. The duty of making the inquiry is one which is offered to and accepted by the individual *ad hoc*. If he is unable to complete it and to make his report for any reason, there is no question of
- F appointing a successor to the office of conducting that inquiry. There has to be a new inquiry by another individual equally appointed *ad hoc*, and upon terms which fall to be separately negotiated with him.

- Turning now to the judgment of Walton J., there were four factors present in the instant case which, in his view, rendered the conclusion that Mr. Clinch was the holder of an "office" inevitable. The first of these was that the
- G person appointed to hold an inquiry has no employer. Now of course, I agree that the absence of an employer must narrow the field of inquiry where the question is whether the propositus holds an "office or employment". But I cannot, speaking for myself, see why the absence of an employer is itself indicative of the holding of an office. It could only be so on the footing that the words "office or employment" were themselves exhaustive descriptions of
- H every method of earning taxable profits, which they plainly are not. And indeed, a great many employees hold offices under their employer. It may be, however, that what the learned Judge had in mind here was the statement of Lord Normand in *Dale v. Commissioners of Inland Revenue*⁽⁷⁾ that "office" is an apt word to describe any position in which services are done by the holder and in which the holder has no employer. But Lord Normand's reference to
- I "any position" has, I think, to be viewed in the context in which he made it,

(1) 40 TC 11; [1962] AC 813.

(2) 8 TC 231.

(3) 24 TC 190.

(4) 40 TC 11, at p 49.

(5) 46 TC 574; [1971] 1 WLR 212; 1971 SC (HL) 30.

(6) 46 TC 574, at p 589.

(7) 34 TC 468; [1954] AC 11.

that is to say, in relation to a position (in that case, that of a trustee) which existed quite apart from the individual appointed to hold it. A

The second feature to which the learned Judge attached critical importance was (and I quote from the judgment⁽¹⁾) “that the person who conducts the inquiry is the person appointed, the Inspector, and not Mr. Clinch considered as a person. Without the appointment having first been made, his acts would be wholly nugatory”. I am not sure that I follow this. Of course it is true that Mr. Clinch has no authority to conduct an inquiry unless the Secretary of State engages him to conduct it, but I do not myself see why this is determinative of the nature of that which he is engaged to do. An agent has no power to bind his principal unless he is authorised to do so, but such authority does not convert him into the holder of an office. Nor indeed does it appear to be entirely accurate to say that the person who conducts the inquiry is not Mr. Clinch considered as a person. The assumption here seems to be that upon appointment Mr. Clinch dons a sort of Greek mask—that of an “Inspector”. But, as I have already mentioned, the expression “the Inspector” is merely a convenient term which has no statutory foundation and when one examines the form of appointment it is seen that it appoints “Mr. F. M. Clinch, B.Sc., A.C.G.I., C.Eng., F.I.Mun.E., F.I.C.E., M.R.T.P.I., to hold a Public Local Inquiry for the purpose of hearing objections and representations” and so on. Of course, if he did not appoint Mr. Clinch, the Secretary of State would find somebody else to perform the same function, because he is charged with the duty of causing an inquiry to be held. B C D

The third matter to which the learned Judge attached great importance was the statutory nature of the duties. I agree that this is an important feature, but for reasons already mentioned, I am unable to regard it as conclusive. In *Mitchell and Edon v. Ross*⁽²⁾ the critical feature was that a part-time consultant under the National Health Service was, as it was said, an instrument of the Minister for the carrying out of the general scheme of the National Health Act, which imposed upon him the duty of providing a general medical service. But that was really quite a different case and it was a case in which the person concerned was remunerated by a regular salary and pension for carrying out the Minister’s function. Here the Secretary of State’s function is not to hold the inquiry but to cause an inquiry to be held and it is of the essence of the inquiry that it should be conducted by someone who is quite independent of the Secretary of State. Indeed the exhibit referred to in para 4(d) of the Stated Case emphasises that those whose names are included on the panel maintained by the Department “have no allegiance to the Department and the Department has no continuing responsibility for them”. E F G

The final matter, which the learned Judge found to be compulsive, was the fact that if the person appointed was unable to complete the inquiry, the only course open to the Secretary of State would be to appoint another person. This, however, seems to me to point rather against the Crown’s contention or to be at best neutral. It seems to me that it means no more than this, that the Secretary of State would then have to cause a fresh inquiry to be held. I cannot, for my part, find in this any indication that either the person who has failed to complete the first inquiry or the person engaged to carry out the second is the holder of an “office”. H I

(1) Page 376 *ante*; [1979] 1 WLR 338.

(2) 40 TC 11.

- A I do not, therefore, find any of these matters persuasive. Nor, equally, do I find it a persuasive argument that since the person appointed to carry out the inquiry is not carrying on the business or profession of carrying out inquiries, the fees earned cannot be taxable under Schedule D as part of his professional earnings. The function is one which is frequently fulfilled by professional men, by reason of their peculiar expertise, as a normal part of their professional activities and I would not, for my part, consider it a misdescription to describe the fees received as professional receipts. But whether that is right or wrong they would, in any event, be taxable under Case VI of Schedule D. I do not think that the present problem can be answered simply by postulating the question "If it's not an office, what is it?". Ultimately the point is very much one of impression and the application of the ordinary meaning of language.
- B I take a different view from that taken by the learned Judge. I do not think that in the ordinary use of language it would be appropriate to describe Mr. Clinch's activity in carrying out an inquiry as the holding of an office.

I agree that the appeal should be allowed

Appeal allowed, with costs. Leave to appeal to the House of Lords granted on terms.

D

- The Crown's appeal was heard in the House of Lords (Lords Wilberforce, Salmon, Edmund-Davies, Lowry and Bridge of Harwich) on 16, 17 and 18 June 1981 when judgment was reserved. On 22 October 1981 judgment was given against the Crown (Lords Edmund-Davies and Bridge of Harwich dissenting), with costs.

- (¹) *Sir Ian Percival Q.C., S.-G., Brian Davenport Q.C. and Robert Carnwath* for the Crown. 7.* It is the Crown's primary submission that the words "office or employment" as used in the Act of 1970 are ordinary English words and should be given their ordinary and natural meaning in modern English; see the meaning given to "office" by the Oxford English Dictionary, other dictionaries, e.g. Chamber's Twentieth Century Dictionary (1977), express a similar meaning. The taxpayer's position as an inspector appointed by the Secretary of State to carry out a statutory function with statutory powers clearly falls within those definitions. It is only by giving some artificial or special meaning to the word that an opposite conclusion can be reached. There is nothing in the Act of 1970 to show that Parliament intended that the word should be given other than its ordinary and natural meaning.

8. The Court of Appeal held that the appointments were personal to the taxpayer and had no independent existence apart from him and therefore could not be "offices" for the purposes of Schedule E; see [1981] Ch 1. 12D (Buckley L.J.), 17H (Ackner L.J.). 20E-F (Oliver L.J.)⁽²⁾.

(¹) Argument reported by Michael Gardner Esq., Barrister-at-law. *Reporter's note. Numbered paragraphs are summarised extracts from the Crown's printed case referred to in the speech of Lord Lowry, post, p 418-27 et eqs. Subsequent unnumbered paragraphs refer to oral argument before the committee.

(²) Pages 386, 391 and 393 *ante*.

9. There is no one single criterion for deciding what is an office. Nor is there a single negative criterion for deciding what is not an office. In deciding that the concept of continuity or permanence was an essential criterion the Court of Appeal fell into error; they allowed themselves to be misled away from the ordinary meaning of the word by a consideration of authorities decided at a time when the Income Tax Acts were different from the Act of 1970 and when they contained provisions that did lead to the conclusion that continuance or succession was an important characteristic of "office" as used in the earlier Acts. Those provisions were finally repealed in 1956. A B

10. The concept of independent existence and continuity to which the Court of Appeal attached decisive importance, is not found in the dictionary definitions of "office". It owes its genesis to words of Rowlatt J. in *Great Western Railway Co. v. Bater*⁽¹⁾ [1920] 3 KB 266, 274. C

11. In the House of Lords, those words were referred to with approval only by Lord Atkinson [1922] 2 AC 1, 15; the *ratio decidendi* of that case that the office or employment of the clerk in question was not "public" or "of a public nature", as was indeed recognised by Lord Atkinson in *Ingle v. Farrand*⁽²⁾ [1927] AC 417, 425.

12. The concepts of independent existence and permanence referred to by Rowlatt J. in *Bater* were derived not from the ordinary meaning of "office" but from a particular feature of the statutory context as it had stood since 1842 and still stood at the time of his decision. At that time it applied not simply to "offices" but to all "public offices" and "employments... of a public nature". This was recognised by Rowlatt J. in that he spoke in terms of the necessary attributes of "an office or employment". D E

13. The feature of the statutory context that influenced his statement was, as he said, contained in s 146 of the Income Tax Act 1842. By s 1 of that Act tax was charged under Schedule E on "every public office or employment of profit". Section 146 contained the rules, which included express reference to a "successor": see rule 1. In subsequent consolidations that provision was reproduced (with immaterial amendments) as Schedule E, rule 2 in the Income Tax Act 1918 and as para 2 of Sch 9 in the Income Tax Act 1952. It was finally repealed in 1956, and no trace of the concept of continuity or *succession* is to be found in the Act of 1970. F

14. The rule was specifically relied on by Rowlatt J. as the basis of his interpretation. Similarly, Lord Atkinson [1922] 2 AC 1, 14, when adopting the same words, referred specifically to the reference to a "successor" and said that it seemed to indicate continuity of the office or employment and also the existence of something external to the person who might hold the one or exercise the other. G

As a matter of general principle, in the construction of statutes the words of the Act under consideration should be construed for what they say. Reference to earlier Acts is to be avoided unless they assist in the construction of the later Act. Earlier Acts do not assist when in different terms, and construction put on earlier Acts do not assist when, as in the instant cases, they are based on words not contained in the later Act. H

15. It is also relevant that the very Schedules themselves were very different at the time of *Bater* from those of today. From 1842 until 1922 employments not included in Schedule E were charged under Schedule D and, I

⁽¹⁾ 8 TC 231.

⁽²⁾ 11 TC 446.

- A except in the case of overseas employments, under Case II of that Schedule. The relevant rule stated that the charge extended to "every employment by retainer in any character whatever, whether such retainer shall be annual, or for a longer or shorter period" (in the 1918 Act Schedule D, Rule Applicable to Case II). Thus, employments such as that of the railway clerk in *Bater*⁽¹⁾ (which that case held was not within Schedule E) were chargeable under Case II of Schedule D. Shortly after the *Bater* decision, all employments previously charged under Case II of Schedule D were transferred to Schedule E by s 18(1) of the Finance Act 1922, which also provided that the rules applicable to Schedule E "shall apply accordingly". The resulting position can best be seen in the Act of 1952. In that Act the Schedule E charge is set out in s 156. Paragraph 1 of Schedule E reproduces the original Schedule E charge in respect of "every public office or employment of profit". Paragraph 2 reproduces the charge on other offices and employments transferred from Schedule D in 1922. The rules applicable to Schedule E are set out in Sch 9. Paragraph 2 reproduces the provisions on which Rowlatt J. based his conception of the nature of a Schedule E office or employment. Yet it is stated as a rule applying to Schedule E generally, not merely to para 1. It could not seriously be argued from this that the scope of para 2 as well as that of para 1 must be limited to offices and employments having the qualities of independent existence and continuity. Thus, the basis on which Rowlatt J.'s conception of a Schedule E office or employment rested was already partially invalidated. It was finally removed altogether by s 10 of the Finance Act 1956, which completely recast the Schedule E charge on offices and employments.
- E At that stage, the word "public" disappeared from the charging provision, and the rule derived from rule 1 of Schedule E in the Act of 1842 was repealed. The Act of 1970 consolidation follows the wording of the Act of 1956.

16. The statutory changes culminating in the Act of 1956 make it not merely unsafe but positively wrong to refer to the dictum of Rowlatt J. when considering the meaning of "office" or "employment" in the Act of 1970.

- F The words of Schedule E should now be given their ordinary meaning and not an artificially restricted meaning derived from superseded machinery provisions. The Crown adopts the words of Megarry J. when commenting on the speeches in *Bater* [1922] 2 AC 1 in *Graham v. White*⁽²⁾ [1972] 1 WLR 874, 879.

17. Once one disregards the supposed requirement of independent existence derived from rule 1 of the Act of 1842 and its successors, the ordinary and natural meaning of "office" can be applied. Even in the authorities following *Bater* many judges referred to that meaning as well as or in substitution for the *Bater* description. Thus, (a) in *McMillan v. Guest*⁽³⁾ [1942] AC 561, 567 Lord Wright cited with approval the first limb of the dictionary definition quoted in para 7 above. Although he also referred to the need for "some degree of permanence and publicity", he appeared to regard those requirements as additional to the interpretation of the words "according to the ordinary use of language". (This distinction was noted by Oliver L.J. [1981] Ch 1, 22⁽⁴⁾.) (b) In the same case in the Court of Appeal [1941] 1 KB 258, 270 Sir Wilfrid Greene M.R. referred to an "office" as "a complex of rights and duties". (c) In *Mitchell and Edon v. Ross*⁽⁵⁾ [1960] Ch 498, 522, Lord Evershed M.R. referred to and applied the first limb of the dictionary definition as an alternative test to that derived from Rowlatt J. (d) In *Dale v. Commissioners of Inland Revenue*⁽⁶⁾ [1954] AC 11, 26 Lord Normand, in considering whether a trusteeship was an "office", said that "office" was an

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(1) 8 TC 231.

(2) 48 TC 163.

(3) 24 TC 190.

(4) Page 394 *ante*.

(5) 40 TC 11

(6) 34 TC 468.

apt word to describe a trustee's position, or any position in which services were due by the holder and the holder had no employer. (e) *Commissioners of Inland Revenue v. Brander & Cruickshank* ⁽¹⁾ 1970 SC 116 was the only case to be decided after the changes made by the Act of 1956. Lord Clyde, Lord President, having reviewed the authorities, said that "office" seemed to point to a distinction between the case where the selected person was appointed to a position where he must perform a certain type of work rather than a person who instructed to carry out a particular task. While it is true that Lord Guthrie and Lord Migdale both adopted and applied Rowlatt J.'s dictum, in the House of Lords [1971] 1 WLR 212 only Lord Morris of Borth-y-Gest referred to it. In any event, the questions of independent existence or continuity were not in issue in that case.

18. Further, the concept of continuity is not only not to be found in any dictionary meaning of "office" but also introduces a concept of a *sine qua non* that cannot be supported. An office can be created for a particular occasion (e.g. a coronation) or be created *ad hominem*. Although a judge of the High Court clearly holds an office, no individual judge has a successor or is successor to any other judge. The same holds true for a recorder. It is still less possible to say that a deputy high court judge has a successor or that his position is other than temporary and personal to himself. Yet the deputy high court judge clearly holds an office while his appointment subsists. That a judge's marshal also holds an office was recognised by Rowlatt J. in *Ryall v. Hoare* ⁽²⁾ [1923] 2 KB 447, 455 Those are but a few examples of legal offices that illustrate why the concept of permanence or continuity is not an essential feature of an "office". The position is no different in other fields. Thus in *Pickering v. James* (1873) LR 8 CP 489 Bovill C.J., at p 496, and Brett J., at p 508, referred to the position of a presiding officer at a polling station under the Ballot Act 1872 as an office. In *Taylor v. Provan* ⁽³⁾ [1975] AC 194, 205H—206A Lord Reid drew a contrast between, on the one hand, the "office or employment" in that case, which was "created for the appellant because of his special qualifications", and, on the other, the type of office that "has an independent existence".

19. A feature that is to be found in the case of many offices is that the duties of the holder are not defined by any contract but only by the nature of the office itself. This feature was mentioned by Lord Clyde in *Commissioners of Inland Revenue v. Brander & Cruickshank* ⁽⁴⁾ 1970 SC 116, and in appropriate cases it too may be of assistance. It illustrates why, for example, a judge holds an office whereas an arbitrator does not. Whether or not any judge is appointed by contract, his duties are clearly not contractual duties but attach by reason of his position. An arbitrator's appointment is purely contractual; the parties may limit or enlarge his powers as they wish and can terminate the appointment at will. On this test, the taxpayer clearly held an office. It was, moreover, one that had a public character as a part of the machinery of the government of the country. Moreover, he held a position recognized by statute, and while his appointment subsisted he had statutory powers to enable him more effectively to carry out his functions. The Crown does not submit that the question whether the duties under contract is *the* test; the question whether a contract exists and, if so, what are its terms is a matter that may be most uncertain, especially in the case of Crown servants. It is however, a matter that can be of assistance and is so on the facts of this case.

20. The taxpayer has never suggested that any other Schedule is appropriate than Schedule D, Case II (although in argument the Court of

(1) 46 TC 574.

(2) 8 TC 521.

(3) 49 TC 579.

(4) 46 TC 574.

- A Appeal suggested Case VI). The Case Stated is almost silent as to what else the taxpayer did in the years in question. The holding of a public inquiry as the “appointed person” could not, however, properly be described as the carrying on of a profession or vocation. Being a professional man may be the reason why a person is selected for appointment, but the appointment is not part of the exercise of the profession. In the same way, being a barrister qualifies a person to act as deputy high court judge, but, once appointed, acting as such is not exercising the profession of a barrister.

21. In the Court of Appeal, the arguments related solely to the question whether each of the taxpayer’s appointments constituted as “office” within Schedule E. The Crown seeks leave to argue, as an alternative to the principal submission set out above, that in any event each appointment constituted an “employment” within the meaning of the composite expression “office” or “employment” as used in Schedule E. The two terms are very largely overlapping in extent, particularly in relation to service under the Crown, and the choice of one rather than the other to describe a particular position or appointment is more often than not a matter of usage rather than of legal classification. “Employment” by itself is as appropriate to almost all forms of service under the Crown as it is to service under a private contract of service. It is appropriate in the present case. In particular, even if “office” independently of context carries *prima facie* connotations of independent existence and continuity, “employment carries no such restrictive connotations and could only acquire them from a clear restrictive context of a kind that certainly does not exist in Schedule E at the present day.

- E 22. If independent existence and continuity are essential ingredients of an “office” on the facts found by the commissioners the taxpayer’s position satisfied the test.

- 23/24. The understanding of the Court of Appeal [1981] Ch 1, 11H–12A⁽¹⁾ on which their view to the contrary was based conflicts with facts as found by the commissioners. Paragraphs 3 (h) of the Case Stated indicates that in such circumstances “the department . . . would then find some other inspector to conclude the inquiry”. Quite apart from that specific finding, the Court of Appeal’s view is based on a misunderstanding of the position of an inspector at such inquiries. This has recently been considered by the House of Lords in *Bushell v. Secretary of State for the Environment* [1981] AC 75.

- G 25. In public inquiries, as in other judicial or quasi-judicial proceedings, there are obvious practical difficulties in allowing a hearing commenced by one person to be concluded by another. However, such a procedure has been allowed in appropriate circumstances in judicial proceedings. The rules of natural justice would sometimes require a rehearing of evidence if the appointed person could not write the report. Similarly, in public inquiries there is no objection in principle to the identity of an inspector changing during the course of an inquiry, and examples do occur. It may also happen where an inquiry is “reopened” for some reason after the original inspector has submitted his report, for example, because the resulting decision has been quashed by the court, or because some aspect requires further investigation in the light of new circumstances.

- I 26. These examples are admittedly infrequent. However, they are sufficient to indicate that, even applying the tests enunciated by the Court of Appeal, the position of “appointed person” or “inspector” in relation to any

(¹)Pages 385–6 ante.

particular inquiry is in principle an office independent of the person who is holding it. The office is constituted by the decision of the Secretary of State to cause a local inquiry to be held into particular matters. It is filled by the appointment of a particular individual, such as the taxpayer in this case. Thereafter, it is normally coterminous with his appointment but is not necessarily so. A

A barrister is not an exact analogy with the taxpayer: a barrister appears for a client. The commissioners are saying that if an appointment is merely transient it cannot be an office. The Crown would accept that if it is permanent, continuous, those are factors that point towards its being an office. Its absence, however, cannot lead to the conclusion that it is not an office. It cannot be right in law to say that if it is merely transient etc., the appointee cannot be carrying out an office. To give one example illustrating the weakness of the proposition, we no longer have commissioners of assize, but until quite recently it was quite common for a commissioner of assize to be appointed at an assize town for one case or for a period. Nobody would have doubted that he was appointed to an office and was taxable under Schedule D. An office does not have to have a title. A deputy recorder would be the holder of an office. One has never heard it suggested that because he only sits for one day he could not be the holder of an office. The taxpayer did not obtain an office when he was put on the panel of inspectors. Each inquiry is a separate office. For tax purposes, a separate office begins each time the taxpayer is appointed to conduct a particular inquiry. It is of some relevance that his appointment is under statute for the performance of a public duty. He is also in part carrying out the duties of the Secretary of State. It is wrong to try to distinguish absolutely between office and employment. Offices and employment may well overlap. B
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When appointed, the written authority from the Secretary of State appointing him to hold the inquiry is all the instruction that the taxpayer receives. The rest is in the rules: Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967. The Crown does not say that there must be absence of control to make an office, but absence of control, acting according to external rules, etc., are indications that a person holds an office. There the rules flow from the appointment; they are not laid down for the particular appointment. F

In a sense, the provisions of Schedules D and E are mutually exclusive, but that does not mean that all earnings of a professional man have to be under one Schedule or another: See *Mitchell and Edon v. Ross*⁽¹⁾ [1962] AC 814. The considerations referred to by the taxpayer in this connection do not go to what is the right answer in law, but the following comments may be made: (i) the consequence of the disallowance of travelling expenses under Schedule E can be avoided by paying expenses as a grossed-up amount; (ii) it is true that artificial fluctuations in income result from tax being charged under Schedule E on a current year basis and under Schedule D on a preceding year basis and that there are different bases of assessment under the two Schedules, but it is well known that these consequences arise. G
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The ordinary meaning of "office" should be applied. As Buckley L.J. said [1981] Ch 1, 5⁽²⁾, it has a wide variety of meanings; there is no one meaning. The taxpayer says that some concept of permanence or continuity is necessary, but a concept of existence independent of the person is almost beyond giving effect to. Can it be said that the office of deputy recorder has an I

(1) 40 TC 11.

(2) Page 380 *ante*.

- A existence independent of him? Yes, in a sense: the person is being something more than himself, but to say that to be an office it must have an existence independent of self is not conclusive. The Crown accepts that where one can say that the position has an existence apart from the man, where there is continuance or permanence, that is a pointer to a conclusion that it is an office, but neither is a *sine qua non*. When Rowlatt J. in *Great Western Railway Co. v. Bater*⁽¹⁾ [1920] 3 KB 266 refers to permanence and continuity, he is speaking of offices *and* employments. This is confusing. It is an approach that was invalidated in 1956, when “notwithstanding... any such office or employment” in rule 1 of s 146, and the last two lines as well, went out. Parliament has swept away the guidelines and left “office” to its ordinary and natural meaning.
- C There may be a practical difficulty regarding fees for commissioners of assize: if tax is not deducted at source, they will be included under “professional fees” and come under Schedule D by default.

A recorder, a deputy recorder, an assistant recorder and a deputy circuit judge are all offices, public offices. The old-style recorder’s appointment was continuous; it continued after his death or retirement; the others are *ad hoc* or *ad hominem*.

- The proposition that for a post to be an office there must be an element of permanence of continuity as a requirement, comes from *Great Western Railway Co. v. Bater* [1920] 3 KB 266; [1921] 2 KB 128; [1922] 2 AC 1. The decision in that case was not just “coloured by” the wording of the Act of 1842, as Buckley L.J. said [1981] Ch 1, 7⁽³⁾; it was a decision on that wording.
- E Also, Rowlatt J. [1920] 3 KB 266, 274 was speaking of “office or employment” as a single term.

- There may be an overlap. There is no reason why the holder of an office cannot be employed as well. The commissioners found that the taxpayer was not employed, but he was “employed to carry out the duties of the office”. There is nothing to be drawn from *Bater* that is of any value in the present case. It is common ground that the taxpayer was not employed in the sense of being a regular employee, with a salary, etc. It is not possible to reconcile everything that Rowlatt J. said in *Bater*. The answer to the proposition that the appointment must be more than merely transient is that it comes from *Bater*, and there is no foundation for it. There are also a substantial number of indications other than that for saying that *Bater* should not be taken as requiring permanence: see, e.g., *Ryall v. Hoare*⁽²⁾ [1923] 2 KB 447 (a judge’s marshal) (Rowlatt J.); a manager or acting manager: *per* Lord Sterndale M.R. in *Bater*; *Graham v. White*⁽⁴⁾ [1972] 1 WLR 874; Act of 1842, Sch E; Courts-Martial (Appeals) Act 1951.

- Also on the alleged requirement of permanence, the following are persons who are appointed *ad hoc* but hold office: a commissioner of assize, a deputy high court judge, a retired high court judge, and, from a commercial approach, the appointment of a director for a particular purpose: it was held in *Taylor v. Provan*⁽⁵⁾ [1975] AC 194 that that was an office, albeit *ad hoc*: see *per* Lord Reid, at pp. 205H–206A.

(1) 8 TC 231.

(2) Page 381 *ante*.

(3) 8 TC 521.

(4) 48 TC 163.

(5) 49 TC 579.

What is it that distinguishes an office from a "post" (using that as a neutral word)? Taking the various points in meaning (4) in the Oxford English Dictionary: (i) "A position or place to which certain duties are attached." The question is whether the duties follow mainly or entirely from acceptance of the post or are laid down by contract. There is a broad distinction. The natural inference is that the dictionary is referring to the duties attached to the post *qua* post, the duties that spring from the office. That criterion is present here. (ii) "one of a more or less public character": the purpose of a post is public. It is paid for out of public funds, though that it is not conclusive. Nothing is conclusive. Anything that can be described as "judicial" is an office.

The taxpayer would be employed by or under the Crown. Having regard to the considerations referred to by Lord Diplock and Lord Edmund-Davies in *Bushell v. Secretary of State for the Environment* [1981] AC 75, 94–97, 116, 118F, it is apparent that the third and fourth legs of the Oxford English Dictionary definition are fully present (subject to the qualifications referred to) here. Almost every feature recorded in Bacon's Abridgment, "Of the nature of an office and the various kinds of offices", is present in the taxpayer's post.

The Crown's view is supported by *Mitchell and Edon v. Ross*⁽¹⁾ [1960] Ch 145; [1962] AC 814. The present case is *a fortiori*. If one approaches it on the plain and ordinary meaning of "office", with the guidance of *Mitchell and Edon v. Ross* one comes to the conclusion that this is an office. The conclusion reached by all the judges in that case to the effect that appointment as a part-time consultant in the National Health Service would be an office is that for which the Crown argues.

Appointment as a part-time consultant in the National Health Service would be an office.

In conclusion: 1. The test postulated by the commissioners will not stand up. It is not correct in law to say, in effect, that a post cannot be an office unless it has some quality greater than the individual and some quality of permanence, etc. There is no foundation for that. Even if it were to be deduced from what Rowlatt J. said, it is wrong having regard to the examples of transient offices. 2. The case in point satisfies all the tests postulated in the Oxford English Dictionary. 3. All the tests in Bacon's Abridgment are satisfied. 4. There is authority to the same effect directly in point: *Mitchell and Edon v. Ross* [1960] Ch 145. By comparison, the present is an *a fortiori* case. 5. Even if the continuity test is right, it is satisfied here. If the taxpayer were to be released from an inquiry, another inspector would be appointed. 6. The case is within Upjohn J.'s (a) rather than (b) (*Mitchell and Edon v. Ross*, at page 165) on the plain meaning of the words.

The Court of Appeal drew too much from *Great Western Railway Co. v. Bater*⁽²⁾ [1920] 3 KB 266 and subsequent observations on it.

Davenport Q.C. following. The Social Security Act 1973 has something to say about emoluments of office chargeable under Schedule E: emoluments will be deductible class 1 earnings-related social security contributions. A self-employed person pays class 2 contributions and, if his earnings are enough, class 4, earnings-related. If he passes a maximum, he gets back an appropriate

(1) 40 TC 11.

(2) 8 TC 231.

- A sum where he has paid too much. Also, with regard to "secondary contributions" and "employer's contribution", there is special provision for office-holders: the person appointing has to pay the employer's contribution; he does not get anything back. "Employment" in the Act has a special technical meaning: it includes almost everything. It is theoretically possible that a person who pays class 1 contributions may get a slight additional benefit e.g., industrial injury benefit. He may in theory be entitled to unemployment benefit.

- Michael Nolan Q.C.* and *John Gardiner* for the taxpayer. In the particular circumstances of the present case, it makes little difference in financial terms which of the two contentions is right. Both parties have contested the matter as one of principle. The principle is, however, of considerable financial importance to many self-employed professional men who are asked, by virtue of their professional qualifications and experience, to conduct *ad hoc* inquiries under statutory or contractual provisions. Their tax liability may well be considerably increased if their fees for conducting such inquiries are taxed under Schedule E instead of simply being included in their professional receipts. The main causes of increased tax liabilities are these. (1) The disallowance of expenses incurred by the professional man in travelling to and staying at the place where the inquiry is held. (2) Artificial fluctuations in income resulting from the fact that tax under Schedule E is charged on a current year basis whereas tax under Case II of Schedule D is charged on a preceding year basis. Under a system of progressive taxation, such fluctuations may be highly disadvantageous to the taxpayer. (3) The third cause also stems from the difference in the bases of assessment under the two Schedules. The preceding year basis of assessment to tax under Schedule D results, to put it broadly, in the first year's earnings of the taxpayer forming the basis of both his first and his second annual assessments to tax. As a necessary corollary, one of the taxpayer's closing years of earnings (the Revenue having a degree of choice as to the year) does not form the basis of any assessment. Thus, over the whole professional life of the taxpayer the number of annual Schedule E assessments is the same as the number of years of earnings. The relevant statutory provisions are set out in ss 115 to 118 of the Act of 1970. They form a comprehensive scheme for the assessment of professional profits under Schedule D. The scheme will, however, be defeated, and an additional tax liability will arise, if inquiry fees earned during the closing year which do not form the basis of a Schedule D assessment are taxed under Schedule E. A further difference between Schedule D and Schedule E is, of course, that Schedule D tax, being charged on profits, is collected by direct assessment after the balance of profit has been calculated, whereas Schedule E tax is collected by deduction at source under the PAYE regulations in accordance with a prescribed code, though subject to ultimate adjustment where necessary.

It is common ground that the taxpayer was not at any material time in anybody's employment. To be taxed under Schedule E the Crown must, therefore, show that the taxpayer held an office, and, indeed, a series of offices, each being confined to the holding of an inquiry into objections made to a particular proposed order or scheme.

- I No such office, or series of offices, existed in the instant case, and the taxpayer properly falls to be taxed under Schedule D. The word "office", in its ordinary sense and in the context of s 181, connotes a degree of permanence and continuity: continuity in the sense of being capable of being held by successive incumbents. The *ad hoc* appointment of the taxpayer has neither permanence nor continuity. If the invitation is made, and he accepts, he is appointed for the purpose of holding a particular inquiry; to do a particular

piece of work. When it is done, his "appointment" wholly terminates. If he fails to complete the inquiry (as the Court of Appeal rightly pointed out⁽¹⁾) [1981] Ch 1, 12C–E (Buckley L.J.), 16B (Ackner L.J.), 24E–G (Oliver L.J.), another person must be appointed to start it afresh. There is no continuity in the above sense at all. Nor can there be said to be any permanence. A

The reasoning of the Court of Appeal is compelling. They arrived at their conclusion by reference both to the ordinary meaning of words and also to that meaning as supported by the authorities. The taxpayer draws particular attention to the summaries of the pre-existing authorities by all three members of the Court of Appeal⁽²⁾, at pages 6H–10D (Buckley L.J.), 13B–14D (Ackner L.J.) and 20G–23B (Oliver L.J.). All those authorities support the meaning of "office" contended for by the taxpayer and as determined by the Court of Appeal. In particular, they all stress the requirements of continuity and permanence. To hold that the taxpayer held an office would, it is submitted, be contrary to the principle running through all these previous decisions. B C

It is true, as was acknowledged by all three members of the Court of Appeal, that the earlier of the pre-existing authorities (in particular, *Great Western Railway Co. v. Bater*⁽³⁾) [1922] 2 AC 1) were decided in the context of and by reference to a provision related to the assessing procedure (originally found in rule 1 of Schedule E in the Income Tax Act 1842). This provision is not found in the Act of 1970 and was substantially repealed by Sch 5 to the Finance Act 1956. Despite this, the authorities as to the meaning of "office" in earlier legislation are of assistance in determining the meaning of that word in the Act of 1970 for the following reasons. (1) The machinery provision of rule 1 in the Act of 1842 properly falls to be regarded as merely consistent with or consequential on the ordinary or proper meaning of "office". No dramatic significance attaches to its repeal when one considers the expansion of Schedule E from public offices and employments to all offices and employment (including commercial employments) and the imposition of the general procedure for collecting Schedule E tax at source under the PAYE system. The old rule was simply insufficient, as a machinery provision, for the collection of tax under the expanded Schedule E charge. The repeal of this machinery provision cannot alter something so substantial to the Schedule E charge as the meaning of "office"., (2) Lord Atkin and Lord Wright in *McMillan v. Guest*⁽⁴⁾ [1942] AC 561, 564, 566, 567 and Harman L.J. in *Mitchell and Edon v. Ross*⁽⁵⁾ [1960] Ch 498, 530 approached the question by reference to the ordinary meaning of words, which has remained the same. (3) The decision in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁶⁾ [1971] 1 WLR 212 was arrived at by reference to a requirement of continuity and succession (see *per* Lord Morris of Borth-y-Gest, at page 215A–D). That case was decided on legislation materially identical to that contained in the Act of 1970 (and *after* the substantial repeal by the Act of 1956 of the machinery provision referred to above). D E F G H

The reasoning of the Court of Appeal is unimpeachable and the decision of Walton J. was wrong, for the reasons given by the Court of Appeal (see, in particular⁽⁷⁾) [1981] Ch 1, 10E–12A, 15D–18A, 23C–25A). Further, in so far as this case is not solely concerned with a question of law the commissioners were

(1) Page 386, 389, 396–97 *ante*.

(2) Page 381–84, 387–88 and 393–95 *ante*.

(3) 8 TC 231.

(4) 24 TC 190.

(5) 40 TC 11.

(6) 46 TC 574.

(7) Page 384–86, 388–91, and 395–97 *ante*.

- A entitled to conclude on the facts that no office existed, the appointment being “merely a transient, indeterminate, once only execution of a task”.

- The words “office or employment”, in the context of Schedule E, are chameleon-like words that take their colour from their context. See the Schedule E provisions in ss 181 and 204 of the Income and Corporation Taxes Act 1970 and regns 6 and 7 of the Income Tax (Employment) Regulations 1973, from which it is to be inferred that the offices to which s 181 applies are those that are generally suitable for the PAYE system, designed to secure collection of tax for the year. Essentially, it resembles the old rule 1 in the Act of 1842 in that one is looking at a year’s Schedule E income PAYE was introduced in 1943. In the case of a recorder, one takes a figure from the air and then adapts it at the end of the year. The emoluments of a recorder are properly assessed under Schedule E. He is accurately spoken of as a holder of a post or position. There is a difference from the position of an inspector: a recorder is appointed for three years, and he formally undertakes to sit for at least 20 days in the year, so that there is continuity and permanence. As regards all other instances, one really needs all the facts, but one can see that there would be a powerful argument for bringing a deputy high court judge within Schedule E for two reasons: (a) a deputy is in a real sense occupying the position of the regular holder; (b) the treatment of deputy holders of offices in the Income Tax Act 1952: see Sch 9, r 12 and 15, which disappeared in 1956 when it was superseded by the PAYE regulations.

- As a matter of proper administration, the scope of “office” should not be unduly widened so as to bring in matters that do not properly come within it.
- E The practical difference between recorders and inspectors goes to the comparative regularity of the recorder’s sitting, the length of his appointment and the number of cases dealt with.

- One cannot have a transient office: it is a contradiction in terms. One may find a transient holder of a permanent office; that is quite another matter. The commissioners were right to say that this task was not the holding of an office but merely transient. [Reference was made to *Davies v. Braithwaite*(¹) [1931]2 KB 628 and *Great Western Railway Co. v. Bater*(²) [1922] 2 AC 1.] The taxpayer did not hold a position or post; he held an inquiry. The chairman of a royal commission would in some cases hold an office. It is apparent from the cases that the suggestion that something that is not continuous or permanent may yet be an office is quite novel. Other instances are more likely to confuse than to assist. For the case of an assistant boundary commissioner, see the House of Commons (Redistribution of Seats) Act 1949, Sch 1, Pt II, para 1 (2). It is difficult to draw assistance from other instances unless some uniform thread of principle can be discerned, but the position of an arbitrator is analogous. The Crown concedes that an arbitrator appointed under a contract does not hold an office. The same must be true of a statutory arbitrator.
- H [Reference was made to Customs and Excise Management Act 1979, s 127 (arbitration with regard to the value of imported goods).]

One must distinguish an office held by the taxpayer from an instruction to hold an inquiry.

The Court of Appeal were not misled by *Bater*. The position in *Mitchell and Edon v. Ross*(³) [1960] Ch 145, 163, 165 (Upjohn J.); [1960] Ch 498, 521

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(¹) 18 TC 198.

(²) 8 TC 231.

(³) 40 TC 11.

(Lord Evershed M.R.) was quite different; the case is not helpful to the Crown on those facts. A

The question what is an office is a question of law, but the commissioners have taken the view that it does not include something that is merely transient. If that is wrong, their decision goes. If it was right, they were fully entitled to take that view on the facts. Their finding that the taxpayer's task was transient is a finding of fact that they were entitled to make. The contention that that brings it within Schedule E raises a question of law. If there is doubt here, it should be resolved in favour of the taxpayer on the ground of good administration. [Reference was made to *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽¹⁾ [1971] 1 WLR 212 and *Taylor v. Provan*⁽²⁾ [1975] AC 194, 205 (Lord Reid), 209D–E (Lord Morris of Borth-y-Gest); 215 (Lord Wilberforce).] B C

Gardiner following. If the Crown is right, the taxpayer holds an office for each particular proposed compulsory purchase order. The charge to tax attaches to the emoluments of the office which must be continuing and identifiable, and not merely payment for a particular task. The definition in the Shorter Oxford English Dictionary relied on by the Crown, in fact connotes a degree of continuity and permanence. As to courts-martial, the Act of 1842 referred to any office belonging to a court. That does not mean that everything associated with a court-martial is an office. The warrant is, however, for the purposes of the court-martial: "appoint you to exercise the office of judge advocate". That indicates permanent, continuing people: "appoint any person to execute the office of judge advocate". The office continues though the person executing it may not. D E

Percival Q.C., S.-G. in reply. "Transient" has very little part here. The position occupied by the taxpayer is an important part of the administration of this country. It is indistinguishable from that of other offices, e.g., recorders. It is part of the public administration processes of the country. It has to be carried out whether the Secretary of State likes it or not. The only thing that is transient is that for each appointment there must be a specific individual. The question is as to the nature of the post. It is not conclusive that it has never existed before, nor that it has not got a name. It is a question of the nature of the duties in each case, however the person comes to occupy the post. *Taylor v. Provan* [1975] AC 194 illustrates this: there, there was no existing post. An arbitrator does not hold an office. (A statutory arbitrator perhaps could.) There is a fundamental difference: the arbitrator's is a consensual appointment as a matter of contract. It could be a helpful approach to ask whether he occupies an official position. At least, that might be a strong pointer. If there is one *ratio decidendi* more apparent in *Great Western Railway Co. v. Bater*⁽³⁾ [1920] 3 KB 266 than another, it is that the office or employment had to be public: see *per* Lord Evershed M.R. in *Mitchell and Edon v. Ross*⁽⁴⁾ [1960] Ch 498, 521. F G H

To summarise, (1) if it is a rule of law that the office must have some existence independent of the holder and some permanence and continuity, the commissioners' decision is right. It is, however, manifest that there is no authority, no general rule of law and no rule of common sense on which such a rule of law could be based. (2) Once the supposed rule has gone, various considerations have a bearing on whether this is an office or not. All the points I

(1) 46 TC 574.

(2) 49 TC 579.

(3) 8 TC 231.

(4) 40 TC 11.

A that the Crown has made, all the indications, support its proposition that where a person is appointed to perform part of the administration of the process of arriving at a decision regarding the public administration of the country, in which he is exercising a judicial, or at the very least a quasi-judicial, function independent of the Secretary of State, he is the holder of an office.

B Their Lordships took time for consideration

The following case was cited in addition to those referred to in the speeches:—*Wednesday Corporation v. Ministry of Housing and Local Government* (No.2) [1966] 2 QB 275.

C **Lord Wilberforce**—My Lords, this appeal is concerned with the taxation of fees received by the Respondent, a civil engineer by profession, in respect of public inquiries which he was asked to carry out by the Secretary of State for the Environment. Should they be taxed under Schedule E or under Schedule D? The Revenue seeks to tax him under Schedule E as the holder of an office. The existence of two separate Schedules under which the citizen may be assessed, with different results, for income tax has over the 140 years in which it has survived, with minor changes, created perplexity. This is nonetheless so because apparently minor changes are made in the Schedules from time to time as to which it is not disclosed whether any change in principle or substance has been intended.

E The word “office” has been in the income tax legislation all along: the Act of 1842 referred to “Every public office”. Since 1922 the qualification “public” has disappeared so all offices are now taxed under Schedule E. At no time has any definition of “office” been provided, so the Judges have been left to work out what the word included. In performing this task, they naturally looked for a context. They found one in r 1 of Schedule E in the Act of 1842 (quoted by my noble and learned friend Lord Bridge of Harwich)

F which contemplated that the tax would be levied on the office as such over a whole year. This it was, I think, which led to the well known Rowlatt definition of office, or, as it has later been called, a generally sufficient statement of the meaning of the word as used in the 1842 Act. An office was something “which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders,” (*Great Western Railway Co. v. Bater*(¹) [1920] 3 KB 266 at page 274)—a definition or statement, which was, I dare to say, bred into the bones of every practitioner in income tax matters, and more importantly, was known to the legislature, and its drafting agents, on the many occasions when revisions of the Schedules were made or considered.

H Because this was the origin of the income tax meaning of “office”, I have doubts as to the value, or indeed legitimacy, of now resorting to a dictionary for a definition. Of course it would be desirable in an ideal world for expressions in tax legislation to bear ordinary meanings, such as the citizen

(¹) 8 TC 231.

could find out by consulting the Oxford English Dictionary. But it is a fact that many words of ordinary meaning acquire a signification coloured over the years by legal construction in a technical context such that return to the pure source of common parlance is no longer possible. I think that “office” is such a word. A

My noble and learned friend, Lord Bridge of Harwich, has rendered us a service by designating as the critical question whether the Rowlatt definition should be considered as still retaining all its ingredients through successive legislative changes which have (*inter alia*) led to the disappearance of r 1. I do not, for myself, regard the disappearance of r 1, and its successor para 2 of Sch 9 of the Act of 1952—rules concerned with the machinery of assessment—as indicating any legislative intention to change the meaning of the word “office”. For the same reason I would reject the Respondent’s counterpart argument based on the (assessment) provision now contained in s 204 of the 1970 Act. But I would agree that in the natural course of development, it is open to the Courts, and right, to consider whether the ingredients of the Rowlatt definition are still appropriate, at least in their full force. It would seem to me that the legislature, by continuing to use the word in the taxing words of Schedule E without any corrective definition, showed a general intention to adopt the judicial interpretation of it which, though uncritically, has been consistent and continuous. For myself I would accept that a rigid requirement of permanence is no longer appropriate, nor is vouched by any decided case and continuity need not be regarded as an absolute qualification. But still, if any meaning is to be given to “office” in this legislation, as distinguished from “employment” or “profession” or “trade” or “vocation” (these are the various words used in order to tax people on their earnings), the word must involve a degree of continuance (not necessarily continuity) and of independent existence: it must connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed. This is the concept which was accepted by all three of the members of the Court of Appeal, who all desired, in my opinion rightly, to combine some degree of consistency with what had become accepted notions in the law of income tax, with practical common sense requirements, and without “treating as authoritative decisions which were reached for reasons which may no longer be appropriate”, *per* Buckley L.J. [1981] Ch 1 at page 5(1). Thus the Lord Justice accepted that to constitute an office a post need not be capable of permanent or prolonged or indefinite existence—a development of the law with which I agree. B
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Acceptance of the admittedly somewhat indefinite guidelines suggested above does not, of course, solve the instant, or any similar, problem. It is necessary to appraise the characteristics of the Appellant’s “appointment”. There is in this task an element of common sense evaluation of fact: a task which is committed in the first place to the General Commissioners. Their finding was for the Respondent, and though this is far from sacrosanct, indeed I think that they applied the Rowlatt definition too literally, nevertheless it is not in my opinion, wholly to be disregarded. They described it as “merely a transient, indeterminate, once-only execution of a task for which [the Respondent] was peculiarly qualified”—adding an analogy which I do not find appropriate. H
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The Crown does not contend that the Respondent, who was a member of a panel, and was called on to conduct a number of inquiries, held one office.

A Their contention, which would seem an odd one to an ordinary man, is that he held a series of offices—so did, I suppose, each of the other 60 members of the panel who were called on to act. So each “appointment” has to be judged separately.

B The relevant facts concerning a typical appointment are detailed in other opinions. I am happy to take those presented by Lord Bridge. But with very great hesitation, I have formed the opposite view, on this matter of impression, to his. I agree, on the other hand, with the conclusions of the members of the Court of Appeal(!):

C “...each appointment was personal to the taxpayer; it lacked the characteristic of independent existence and continuance which, in my judgment, is one of the essential characteristics of an ‘office’”, *per* Buckley L.J. l.c. page 12. “It was a temporary, ad hoc, appointment confined to the taxpayer. He was not appointed to a position which had an existence of its own. It had no quality of permanency about it”, *per* Ackner L.J. l.c. page 17. “There is no office of inquirer or inspector created by the Act, but merely a provision authorising the Minister to ‘cause to be held’ the appropriate inquiries.”, *per* Oliver L.J. l.c. page 19

D [surely an effective point] and again: “This [the concept of continuance apart from the individual holder]... is something entirely lacking in the instant case. The duty of making the inquiry is one which is offered to and accepted by the individual ad hoc. If he is unable to complete it and to make his report for any reason, there is no question of appointing a successor to the office of conducting that inquiry. There has to be a new

E inquiry by another individual equally appointed ad hoc, and on terms which fall to be separately negotiated with him”, *per* Oliver L.J. l.c. page 23.

There is no doubt that the factual ingredients detected by their Lordships are correctly stated: I agree with their estimation of their weight.

F Each of the Lord Justices moreover carefully examined and, in my opinion effectively, answered the four points on which Walton J. relied in order to decide for the Crown, and disposed of the argument that the public nature of the Respondent’s duties and their statutory background were significant elements. I would add that I do not find that any decisive argument can be based on analogy with such other cases as recorders or deputy judges or on the relative convenience of taxing the Respondent under one or other of

G Schedule D or Schedule E. The latter provides for bringing temporary employment within the P.A.Y.E. system, and though perhaps some element of estimation would have to be used, the Respondent’s fees could be dealt with in a similar way. Assessment under Schedule D, on the other hand, assuming that this is the right method (we are not called on so to decide), would present no difficulty at all.

H I would dismiss the appeal.

Lord Salmon—My Lords, from time to time prior to 1973 and during the fiscal years 1973–74 and 1974–75, the Secretary of State for the Department of the Environment invited Mr. F.H. Clinch, B.Sc., A.C.G.I., C.Eng., F.I.Mun.E., F.I.C.E., M.R.T.P.I., to hold a public local inquiry for the purpose of hearing objections and representations in respect of compulsory

purchase orders and other like matters for which the Secretary of State was responsible. Neither the Secretary of State nor any subordinate or representative of his could hold such an inquiry. Mr. Clinch was a most experienced and distinguished civil engineer, and no doubt it was for this reason that he was invited to hold the public local inquiries to which I have referred. Mr Clinch accepted a number of these invitations. He received no retainer or salary. His fees, professional fees, as Walton J. pointed out, were paid only in response to the fee accounts which he submitted. It is agreed that he was not employed by the Secretary of State or by anyone else.

When an invitation to hold a public local inquiry was accepted, Mr. Clinch received a written authority signed by the Secretary of State appointing him to hold that inquiry. He then held the inquiry entirely as he thought best, without any direction or guidance from the Secretary of State. Indeed he always announced the independence of his status at the commencement of each inquiry. Mr. Clinch held a number of public local inquiries of various kinds. The parties have however agreed that the inquiries were all alike, but separate from each other, and therefore that the inquiry relating to a proposed compulsory purchase order for the land required for a trunk road should be regarded as typical of all the other inquiries held by Mr. Clinch. At the conclusion of an inquiry, Mr. Clinch made a report to the Secretary of State. This report set out Mr. Clinch's findings of fact and recommendations, or his reasons for not making any recommendations. In spite of his power to compel witnesses to attend the inquiry to give evidence and produce documents, he had no power to make any decision. He could only report his findings of fact and his recommendations to the Secretary of State—which the Secretary was entitled to reject. Mr. Clinch's function was only to inform and advise but never to decide. Accordingly, his function, in my view, was in no way judicial or even quasi-judicial.

Prior to 1973, the Inland Revenue clearly considered (and I think rightly) that Mr. Clinch and others like him who did the kind of work to which I have referred were earning their income arising or accruing from their profession or vocation, and were therefore taxable only under Case II of Schedule D (see s 108(1)(a)(ii) and s 109(2) of the Income and Corporation Taxes Act 1970) which relates only to tax in respect of "profits or gains arising or accruing . . . from . . . any profession or vocation not contained in any other schedule". And this was the way in which Mr. Clinch always had been taxed prior to 1973. It seems never to have occurred to the Inland Revenue prior to that year that Mr. Clinch or anyone of his profession doing his kind of work could be regarded as holding "an office"; and therefore it was concluded that they could not be taxed under Case I of Schedule E (s 181 of the 1970 Act) which relates only to tax charged "in respect of any office or employment on emoluments therefrom. . .". During 1973 however, the Inland Revenue appears to have changed its mind. It assessed Mr. Clinch, and those like him, for tax under Case I of Schedule E without giving the taxpayers any warning. Walton J. states that the Inland Revenue had behaved in "an extremely insensitive manner, and are to be censured accordingly". I agree, and might have been tempted to use even stronger language.

To be taxed under Case I of Schedule E instead of under Case II of Schedule D usually results in the taxpayers such as Mr. Clinch paying substantially more tax than they had previously paid. For example, the assessment for tax under Case I of Schedule E in the years 1973-74 amounted to £6,678 and in the year 1974-75 to £11,579. Had the assessment of tax for those two years been made under Case II of Schedule D it would, as the

- A Commissioners found, have amounted only to £4,871 and £4,651 respectively. The Commissioners found in favour of Mr. Clinch, that he should be taxed just as he always had been under Case II of Schedule D. Walton J. reversed the Commissioners' findings and the Court of Appeal allowed the appeal from Walton J's judgment. My Lords, the question upon which this appeal to your Lordships turns is whether the Inland Revenue was right in asserting that the Secretary of State for the Department of the Environment had appointed Mr. Clinch and his like taxpayers to "an office". The Inland Revenue prior to 1973 had never made any such assertion and indeed for very many years had acted on the basis that such an assertion was impossible.

- C My Lords, there is no shortage of authorities in which most distinguished lawyers clearly support the Respondent's case. They state clearly what facts are necessary to exist in order to enable anyone to be appointed an office holder. In my opinion, no such facts exist in the present case; and I certainly find nothing to justify any dissent from what was said by Lord Atkin, Lord Wright, Lord Porter, Lord Morris of Borth-y-Gest and a number of others to which I am about to refer.

- D In *McMillan v. Guest*⁽¹⁾ [1942] AC 561 the point arose as to whether a non-executive director of a private limited company was assessable under Schedule E for his remuneration as a director on the ground that he held an "office". Lord Atkin said at page 564:

- E "It is necessary to consider whether the appellant(1) held an office. . . (1) On the first point there was no dispute. there is no statutory definition of 'office'. Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt J. in *Great Western Ry. Co. v. Bater*⁽²⁾, adopted by Lord Atkinson⁽²⁾ as a generally sufficient statement of the meaning of the word: 'an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders.' There can be no doubt that the director of a company holds such an office as is described."

- G Lord Roche agreed with Lord Atkin. Lord Wright said at page 566: "The word 'office' is of indefinite content. Its various meanings cover four columns of the New English Dictionary. . .". He then went on to say that he imagined that the words in *Bater's* case (*supra*) were deliberately left vague and that the words should be applied⁽³⁾ "according to the ordinary use of language and the dictates of common sense with due regard to the requirements that there must be some degree of permanence and publicity in the office". I shall later return to Lord Wright's speech.

- H It has not been disputed that each inquiry by Mr. Clinch came to an end if he did not finish it, or, if when he did finish it, he reported it to the Minister. Thus all the inquiries were disconnected from each other.

The last authority to which I need refer is *Commissioners of Inland Revenue v. Brander & Cruickshand*⁽⁴⁾ [1971] 1 WLR 212 on the termination of the taxpayers' appointments as registrars of two companies which had been taken over. They were paid £2,500 by those companies. The Inland Revenue

I (1) 24 TC 190.

(2) 8 TC 231.

(3) [1942] AC 561 at p 567.

(4) 46 TC 574.

claimed that that payment should have been treated as profits assessable under Case II of Schedule D. The First Division of the Court of Session, and (on appeal) your Lordships' House held that the payment could not be taxed under Case II of Schedule D and that it could not be taxed under Schedule E since it amounted to not more than £5,000 (see s 38(3) of the Finance Act 1960); and but for s 38(3), the taxpayers would have been liable to be taxed under Schedule E because they held an "office". In the Court of Session, 46 TC 574, Lord Guthrie and Lord Migdale, at pages 584 and 587 respectively, treated the words of Rowlatt J. in *Bater's*⁽¹⁾ case as a generally sufficient statement of the meaning of the word "office". Lord Guthrie said:

"What the Special Commissioners had to decide was whether in the particular cases of the two companies, the Respondents were holders of substantive positions to which duties were attached, *and which had the quality of permanency irrespective of the particular holder's tenure*, or whether they merely did some work of a particular kind for the companies." The emphasis is mine. Lord Migdale said: "This work of keeping the registers entailed a position which had an existence of its own. If one holder gave it up someone else had to be appointed to carry it on."

Lord Morris of Borth-y-Gest at page 215 of [1971] 1 WLR 212 said:

"Even though the Companies Act does not require that there should be an appointment as registrar, a company must arrange that some person or persons should on its behalf perform the statutory duties of maintaining its register. In doing so, it may establish a position which successively will be held by different persons. If it does so, the company may have created what could rationally for income tax purposes be called an office. In *McMillan v. Guest*⁽²⁾ [1942] A.C. 561 Lord Atkin, while pointing out that there is no statutory definition of 'office', was prepared to accept what Rowlatt J. had said in *Great Western Railway Co. v. Bater* [1920] 3 KB 266, 274 (as adopted by Lord Atkinson [1922] 2 A.C. 1, 15) as being a generally sufficient statement of meaning."

The highly respected authorities to which I have referred have all agreed as to the meaning of the word "office" in Schedule E, namely, "a subsisting, permanent, substantive position which has an existence independent of the person who fills it". Accordingly, if that meaning is missing, as it is in the present case, the person concerned could not be taxed under Schedule E as an office holder.

The meaning of "employment" cannot, in my view, by any means, always have the same meaning as that of "office" in Schedule E. This, in my opinion, is because the meaning of "employment" in Schedule E obviously refers very often to the host of persons being employed to work for no more than a salary or wage which will be taxed under that Schedule. In *McMillan v. Guest*⁽³⁾ (*supra*) Lord Wright said at page 566: "To hold that the director of a company . . . does not have an office within the meaning of the schedule would . . . be an abuse of language . . . The word 'employment' . . . has to be construed with and takes its colour from the word 'office'". In a contract of employment between a company and a person, the contract of employment sometimes in the commercial field has a clause which gives the person employed an office as a director. This may be what Lord Wright had in mind when he said "The word 'employment', in my opinion, has to be construed with and takes its

(1) 8 TC 231.

(2) 24 TC 190.

(3) [1942] AC 561.

A colour from the word 'office'". Unlike the word "employment", the word "office" is fairly difficult to understand in its context; and it has no statutory definition.

Mr. Clinch (whom it is agreed was not employed) held a number of separate public local inquiries over the years. These inquiries did not constitute one continuing office: nor did the Inland Revenue suggest that they did. The Inland Revenue, however, argued that each local public inquiry from the moment it commenced to the moment that it finished made Mr. Clinch the holder of an office under Schedule E. I do not agree with that argument. I should like to adopt the words of Ackner L.J. at page 536 of [1980] 3 WLR 521⁽¹⁾:

C "It was a temporary, ad hoc, appointment confined to the taxpayer. He was not appointed to a position which had an existence of its own. It had no quality of permanency about it. . . It was, as the general commissioners correctly observed, a transient, indeterminate, once only, execution of a task for which the taxpayer was peculiarly qualified."

I cannot agree that the dictionary meaning of the word "office" can or was intended to be of any real help in construing the word "office" in Schedule E, particularly having regard to the authorities to which I have referred.

I have had the advantage of reading the speech of my noble and learned friend, Lord Bridge of Harwich, which I admire but with which I respectfully cannot agree. He relies on one of the many definitions in the Oxford English Dictionary of the word "office" which reads as follows:—"A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc". Mr. Clinch, no doubt, occupied a position to which duties of a public character are attached. So does a dustman. Mr. Clinch was in a position of authority. So is a foreman. But neither the dustman nor the foreman can be the holders of an "office". I do not think that Mr. Clinch holds a place in the administration of government. In any event, there are some people who do but do *not* hold an "office". Mr. Clinch certainly has no employer; nor has a doctor or a solicitor. I do not understand however how the lack of an employer prevents these characters from earning a fee for exercising their professional skill and experience unless they occupy an "office" which they rarely do. I do not agree that Mr. Clinch was not acting in a personal capacity "but in a capacity which derives its existence wholly from . . . his statutory appointment". I agree with Ackner L.J. that⁽²⁾

H "the person who conducts the inquiry is the taxpayer considered as a person. He owes his appointment to the particular skill and/or experience which he has. Of course he would have no locus standi without the formal appointment first being made, but then the same would equally apply to an arbitrator, who [counsel for the Inland Revenue conceded] is not appointed to an 'office'."

I also agree with Ackner L.J. that the phrase "That the duty placed upon the inspector is one which was placed by statute" means, that once having accepted the appointment, the taxpayer's conduct of the inquiry was, to

(1) 391 *ante*.

(2) Page 389, *ante*.

some extent controlled and circumscribed by the relevant statutes. The obligation to observe statutory requirements cannot, however, in itself, create an office. A

Naturally, Mr. Clinch will have to be taxed in respect of the fees he has received for holding national local inquiries for the years 1973–74 and 1974–75. Although, for the reasons I have given, he cannot, in my view, be taxed under Case I of Schedule E, the fees he has earned are taxable as part of his professional earnings. After all, when the holder of the inquiry has to listen to the evidence and inspect the land, his professional skill and experience will enable him to make recommendations as to whether or not it ought to be compulsorily purchased for the purpose of making a trunk road. It seems plain to me that a distinguished civil engineer, because of his particular expertise on this subject, would be the most likely person to be asked, as a part of his professional activities, to make those recommendations. And I would consider it reasonable and right to describe the fees he received as professional receipts under Schedule D—just as they had always been prior to 1973. B
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My Lords, for the reasons I have stated. I would dismiss the appeal.

Lord Edmund-Davies—My Lords, the question raised in this appeal is whether fees paid by the Department of the Environment to the Respondent, a civil engineer, for services rendered by him in conducting from time to time, during the years 1973–74 and 1974–75, public inquiries into such matters as highway construction and improvements and the compulsory acquisition of land were assessable to tax under Schedule E of s 181(1) of the Income and Corporation Taxes Act 1970. The answer is clearly of considerable importance both to the public and to many self-employed people who periodically accept the invitations of Government departments to conduct such inquiries on a fee basis calculated mainly on their duration. Were it not for the fact that others more experienced than I in matters of taxation have hitherto forcefully differed from each other, I would, with the utmost respect, have thought and said that the question did not present great difficulty. Yet the Revenue assessed Mr. Clinch under Schedule E, the General Commissioners under Schedule D, Walton J. under Schedule E, and the Court of Appeal unanimously held that his fees fell to be assessed under Schedule D. And the Solicitor-General has now appealed to your Lordships' House to secure restoration of the order made three years ago by Walton J. D
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The question at the heart of the appeal is: when conducting such an inquiry was Mr. Clinch the holder of an "office" falling within Case I of Schedule E of s 181(1)? The Solicitor-General contends that he was and should therefore be taxed pursuant to that Schedule. For the Respondent, Mr. Clinch, on the other hand, it is contended that the correct Schedule is Schedule D, Case II. H

My Lords, I have already had the advantage of reading in draft what I venture to describe as the admirable speech prepared by my noble and learned friend, Lord Bridge of Harwich, and, had I been left in any doubt at the conclusion of Counsel's submissions, his speech would doubtless have completely convinced me that the appeal should be allowed. But in reality I was from the outset impressed by the clarity and cogency of the judgment of Walton J., and in those circumstances I have been particularly vigilant to detect any grounds upon which his approach and I

A conclusion could be faulted. At the end of the day, I have discovered none.

I am fully alive to the veneration which over the years has attached to the decision of Rowlatt J. in *Great Western Railway Co. v. Bater*⁽¹⁾ [1920] 3 KB 266, and particularly to his adoption (at page 274) of the submission that:

B "... what those who used the language of the Act of 1842 [5 & 6 Vict., cap. 35] meant when they spoke of an office or an employment of profit was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders."

C The indicia enumerated by the learned Judge are doubtless useful pointers to the existence of an "office". It would probably prove difficult to conclude that the occupant of a position having all those characteristics was nevertheless not the holder of an "office", and it may well be that it is in that sense that Rowlatt J.'s words have received over the years exalted judicial acceptance in cases considered in the lower Courts during the progress of this appeal and again in your Lordships' House. But I respectfully find it well-nigh startling to

D have those words invoked as providing the definitive test of the existence of an "office", so that no post lacking all or any of Rowlatt J.'s indicia can possibly deserve the term. The word is not a term of art, but a wide-ranging noun of ordinary usage, as the dictionary definitions demonstrate. And during the expansive submissions of Counsel a substantial number of posts were

E considered which in my judgment completely fitted within the everyday understanding of the term, notwithstanding that they were transient in their very nature and not simply in the duration of tenure of office of a particular person, and furthermore that they were "tailor-made" for people possessing particular talents to discharge tasks of a non-recurring type. My noble and learned friend, Lord Bridge of Harwich, has dealt with some such posts, but

F he has by no means exhausted the list. Walton J. rightly said [1979] 1 WLR 338 at page 345 E-F(?):

"... whilst the permanency of the duties to be discharged may well, in a simple case, form an apt guide as to whether the person discharging them is or is not holding an office, this test is wholly inapplicable to a case where the office is confined to the discharge of one (or a few) specific duties which, in the very nature of such duties, will be discharged within a finite space of time."

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My Lords, learned Counsel for the Respondent submitted that the provisions of s 204 of the 1970 Act, themselves indicate that "office" must be given a meaning severely restricted on the lines indicated by Rowlatt J. He said that subs(3) thereof demonstrates such a necessity, and he indicated certain practical difficulties which would arise in relation to P.A.Y.E. coding were the holder of an "office" in receipt of emoluments episodic and irregular in their payment and unpredictable in their amounts. But for my part I reprehend giving an everyday word a special meaning simply because it would be more convenient to do so owing to the nature of the currently adopted machinery for the assessment and recovery of taxes. If it was desired to give "office" a meaning tailored to the P.A.Y.E. system why did the relevant legislation not

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(1) 8 TC 231.

(2) Page 376, ante.

provide its own dictionary by defining in a special sense a word of such everyday use? A

My Lords, no case similar in its facts to those of the present appeal has been cited or has apparently arisen hitherto. I believe, with the Solicitor-General, that the proper test to be applied is to consider *the nature of the function* performed by the taxpayer. Applying that test to the facts of this case, and notwithstanding the impermanence of the duties discharged from time to time by the Respondent, whenever Mr. Clinch accepted an appointment to conduct a public inquiry of the kind under consideration he became, in my judgment, the holder of an "office" and he continued to hold it until he completed his task by submitting his report. For these reasons, I concur in holding that the appeal of the Solicitor—General should be allowed. B

Lord Lowry—My Lords, I gratefully adopt the summary of the facts contained in the speech of my noble and learned friend, Lord Bridge of Harwich, which I have had the opportunity of reading in draft. I find, too, that I respectfully agree with nearly all of what he is about to say and also with most of what has already been said by my noble and learned friend, Lord Edmund-Davies. Nevertheless, with regret and inevitably with some diffidence, I have reached a different conclusion on the point at issue. C D

I consider that the Respondent was not the holder of an office (and therefore was not assessable under Schedule E) because, in my opinion, the mere appointment to perform a function (in this case the statutory function of holding a public local inquiry) does not by itself mean that the person appointed holds an office within the meaning of Schedule E. To say that the alleged office has no name, since the word "inspector" is merely a convenient description, may put the matter too simply, but it is the base from which I set out. There is no statutory definition of "office", but everyone has been content with the following definition from the Oxford English Dictionary: E

"A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc." F

The word "position" here is ambiguous, since by itself it may either denote a situation in which someone is placed or a specific post to which he is appointed. The latter meaning seems to apply more naturally to an office, particularly in this case, when one looks at such statutory provisions as para 7 of Sch 9 to the Income Tax Act 1952 and now s 181(1) and Schedule E, Case I, of the 1970 Act, which refer to "the holder of an office or employment" and "the duties of the office or employment". It is also permissible to consider the words "office or employment" elsewhere in Part VIII of the 1970 Act: see ss 182, 187 and 188 and Sch 8. Accordingly, I consider that the ordinary meaning of "office" in this context involves the notion of a specific post to which a person can be appointed, which he can hold and which he can vacate. I concede that this is not the only sense in which the word can be understood, but I feel satisfied that it is the primary sense and that the words "position or place" in the dictionary definition ordinarily have a similar meaning. It would seem to follow that, when we describe the Respondent as the holder of an office, we are using the word "office" not in its ordinary meaning but with a special meaning which the ordinary user of English would readily recognise. Much less, I suggest, would he be likely to think that, after carrying out a G H I

- A number of inquiries, the Respondent had held a series of offices. The Respondent has argued for a limited meaning of the word "office", but I consider that the ordinary meaning would serve his purpose, but not the purpose of the Appellant. There is a subtler but perhaps more cogent argument in the Respondent's favour than the mere absence of a name. The "office" comes into being with the act of appointment and automatically ceases to exist when the person appointed concludes his task. I think that to regard this as the holding of an office by the appointed person confuses his function with his so-called office. The Respondent here was in one sense "in an official position", but not, in my opinion, in an official post (or office). A genuine office does not lapse because the holder dies, retires or completes his assignment. To be in a position of authority is not necessarily to hold an office, and when you appoint somebody to *do* something you do not thereby appoint him to *be* something (in other words to hold an office), unless the Act or other relevant instrument says so.

- It is unnecessary for me to review at length the history of the legislation or the earlier decisions. In both respects my work has again been done for me by my noble and learned friend, Lord Bridge, and I have no trouble in accepting his illuminating comments on the cases. One can fairly say that the true *ratio decidendi* of this House in *Bater's* case⁽¹⁾ was that Mr. Hall held no office and that his employment was not public and that, insofar as other reasons were advanced, their Lordships were strongly influenced by r 1 of the 1842 Schedule E.

- The decisions in all the cases reviewed are easily justified by reference to what I have called the ordinary meaning of "office". They also satisfy the full *Bater* test and we have no examples so far of a Court's refusal to apply Schedule E on the ground that *Bater* was not satisfied. Therefore the test has not been relevantly considered. Lord Bridge also rightly points out that the discussion embraces employment as well as office, and now the private as well as the public domain. It is therefore impossible to accept that employment (or, by the same token, office) must be "permanent": if so, Schedule E could not apply to temporary employment or to an office created by name for the performance and completion of a specific task. On this branch of the argument it would be no answer for the Respondent to fall back on Schedule D Case VI, when one thinks of the formerly different consequences of being taxed under this heading.

- The reason for the decision of the General Commissioners must be deduced from para 8 of the Case Stated where they said that the Respondent's discharge of the duties of an inspector did not amount to the holding of an office "as the appointment was merely a transient, indeterminate, once-only execution of a task for which he was particularly qualified—the nearest analogy to which was a barrister or solicitor conducting a case for a client". The Commissioners' analogy with a barrister or solicitor, is in my view, misconceived, and I cannot find a meaning for "indeterminate" which advances the argument. It is, however, clear that the Commissioners found as they did on the ground that the Respondent did not hold an office because his appointment was (or involved) merely a transient and once-only execution of a task. Is that, speaking generally, a good reason in law for holding that Schedule E did not apply? I think not, because a decision against Schedule E based on complete acceptance of the *Bater* test is unsound in law, and the

(1) 8 TC 231.

Commissioners' decision appears to be so based. Where the Appellant's argument goes astray, in my estimation, is in submitting, in effect, "The *Bater*(¹) test is wrong and was accepted by the Commissioners. Therefore we are right." A

I wish now to examine the judgment of Walton J., which was at the commencement of this appeal the only pronouncement in favour of the Crown. The learned Judge set out in [1979] 1 WLR 338 at page 344E(²) four considerations which strongly appealed to him as showing that a person appointed to conduct an enquiry under the 1946 Act was the holder of an office. I would, by way of answer, draw attention to the observations critical of his arguments which were made by the learned Judges of the Court of Appeal (reported at [1981] Ch 1(³)) by Buckley L.J. at pages 10F to 12A, by Ackner L.J. at pages 15E to 16B and by Oliver L.J. at pages 23C to 24F. I consider, with due respect, that these comments entirely dispose of the case as it found favour with the learned Judge at first instance. The first point, "that the inspector has no employer", can only be based on a misapplication of what Lord Normand said in *Dale v. Commissioners of Inland Revenue*(⁴) which Walton J. cited at page 343G. I note that he again mentions trustees at page 346G and reverts to the fallacy of "not employed, therefore holding office" at page 347C. (This reasoning resembles the Crown argument that the absence of control over the inspector spells the holding of office rather than employment, which is equally a *non sequitur* since the real choice is between the holding of office and being engaged on an independent basis.) As to Walton J.'s second point, Ackner L.J. shrewdly points out that the same could be said of an arbitrator. The Judge's third point, although relevant, would also apply to an arbitrator. As for the last point, a second person appointed would not be a "successor in office" in the ordinary way. To sum up, the four points do not in any way persuade me that the word "office" and the phrase "holder of an office" ought to receive the meaning which the Appellant is compelled to give them in preference to what I have ventured to call the ordinary meaning. C D E

It should also be remembered by those who would place emphasis on the public nature of the office, the statutory background and the public source of the remuneration that, since 1922, Schedule E is capable of applying, in the right type of case, to private offices. F

I respectfully agree with Walton J. that the temporary nature of the "office" is not by itself fatal to the Appellant's argument nor is the method of payment. At page 346B the learned Judge is rightly wary of accepting the Crown's point based on asking what profession the taxpayer was carrying on if he was not the holder of an office. The words "profession or vocation" can be given a wide meaning without strain. This point tends to dispose of the learned Judge's further observations at page 346D-G. After all, both businessmen and professional men (whether their main source of income is taxed under Schedule D or E) may undertake engagements of many kinds which do not involve their holding office or being employed. And yet the remuneration from such engagements can be taxed quite easily under Schedule D. G H

If the course of the appeal in your Lordship's House was remarkable for one thing, it was the avoidance of detailed reference to the judgments delivered by a unanimous and distinguished Court of Appeal, as if to say that all one had to consider was the rightness or wrongness of the *Bater*(⁴) test. If I may I

(¹) 8 TC 231.

(²) Pages 375-76.

(³) Pages 384-86, 389, and 395-96 *ante*.

(⁴) [1954] AC 11.

A indulge in a metaphor from the occupation of gold-mining, I would say (without any disrespect, I hope) that the *Bater*⁽¹⁾ test is the crude ore which has now by a series of processes, most recently in the Court of Appeal, been refined into something of superior quality. Let me try to illustrate the point. In *Bater* Rowlatt J., whose opinion was endorsed by Lord Atkinson, thought that Schedule E required “a subsisting, permanent, substantive position, which
 B had an existence independent of the person who filled it” and (no doubt under the influence of rule 1) went on to speak of an office or employment “which went on and was filled in succession by successive holders”. I would digress to say that, if one could have overlooked the fatal absence of a public element, Mr. Hall (as an employee) seems to me to have been capable of satisfying the exacting test which Rowlatt J. laid down. In the same case Lord Atkinson
 C said(?): “Again, the word ‘successor’ is very significant. It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other”. (Rule 1 continues to have a strong influence here.)

Bater was followed by a series of cases which satisfied the *Bater* test, and therefore further refinement was unlikely in the meantime, but, like my noble
 D and learned friend, Lord Bridge, I do not forget the words of Harman L.J. in *Mitchell and Edon v. Ross*⁽²⁾ at page 530: “An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt J. in the *Great Western Railway Co. v. Bater* and approved by Lord Atkin in *McMillan v. Guest*⁽⁴⁾”.

E Thus, when the present case came to be decided, some refining had already been done. The emphasis on permanence and continuity had lessened and the possibility of a once-only appointment had been recognised. But the concept of an office which exists independently of its holder still held sway.

Let me now consider what the Court of Appeal has said, starting with Buckley L.J. at page 5C⁽⁵⁾.

F “In the present case we are faced with the problem of putting a meaning on an ordinary word in the English language, which has been used over a long period in income tax legislation. The courts have from time to time had to consider the proper meaning to be attributed to that ordinary English word in that legislation. It is not, in my judgment, in conflict with the principle enunciated by Lord Wilberforce to look at past decisions to discover what the courts in the past have thought to be the
 G appropriate meaning to attribute to that ordinary English word. In doing so, however, we should guard ourselves against treating as authoritative decisions which were reached for reasons which may no longer be appropriate.”

H The learned Lord Justice carried this idea forward to his discussion of *Bater* at page 7G⁽⁶⁾: “I would consequently accept that that decision should be regarded as coloured by the form of the legislation then in force”. He adverted to the OED definition at page 5G, saying: “This appears to me to indicate, if any such clarification were necessary, that the office is something which is distinct from the holder of the office”. It is fair comment to say that this view

(1) 8 TC 231.

(2) *Ibid.*, at p 246.

(3) [1960] Ch 498; 40 TC 11, at p 49.

(4) 24 TC 190.

(5) [1981] Ch 1; page 380 *ante*.

(6) Page 382 *ante*.

does not appear to have been dictated by the *Bater*⁽¹⁾ test or the now repealed A
r 1 of the 1842 Schedule E.

I also consider helpful the reflections of Buckley L.J. at page 6E-G⁽²⁾:

“Before considering the authorities which bear on this question, I
may perhaps be allowed to say in what sense, unguided by authority and
without attempting to formulate a precise definition, I should be inclined B
to understand the word ‘office’ as used in Schedule E. An ‘office’ in this
context is, in my opinion, a post which can be recognised as existing,
whether it be occupied for the time being or vacant, and which, if
occupied, does not owe its existence in any way to the identity of the
incumbent or his appointment to the post. It follows, I think, that the
office must owe its existence to some constituent instrument, whether it be C
a charter, statute, declaration of trust, contract (other than a contract of
personal service) or instrument of some other kind. It also follows, in my
view, that the office must have a sufficient degree of continuance to admit
of its being held by successive incumbents: it need not be capable of
permanent or prolonged or indefinite existence, but it cannot be limited to
the tenure of one man, for if it were so it would lack that independent
existence which to my mind the word ‘office’ imports.” D

He then (page 8G) takes note of Lord Porter’s observation about the position
of the non-executive director in *McMillan v. Guest*⁽³⁾ (at page 570). “That it is
an office is, I think, plain. It has permanency apart from the temporary holder
and is held in one of the specified corporations. Again (at page 9H), he has
neatly extracted from the speech of Lord Morris of Borth-y-Gest an important
view of *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁴⁾ (at E
page 215):

“Even though the Companies Act does not require that there should
be an appointment as registrar, a company must arrange that some person
or persons should on its behalf perform the statutory duties of
maintaining its register. In doing so, it may establish a position which
successively will be held by different persons. If it does so the company F
may have created what could rationally for income tax purposes be called
an office.”

After a review of the cases the learned Lord Justice said (page 10D)⁽⁵⁾: “In
particular I would draw attention to the frequent references to the character-
istic of continuance.”

Dealing with what seems also in this House to be one of the Crown’s main G
points, the Lord Justice said (page 12B)⁽⁶⁾: “That the duties are statutory . . .
cannot be denied. Nevertheless I for my part cannot regard these character-
istics alone as sufficient to constitute the appointment an appointment to an
office ‘Office’.” He concluded (Page 12 D); “So each appointment was
personal to the taxpayer; it lacked the characteristic of independent existence
and continuance which, in my judgment, is one of the essential characteristics H
of an ‘office’”.

Ackner L.J. (at page 13E) reminds us of what Lord Wright said in
McMillan’s case (at page 567) that the word “office” has to be construed in
relation to the facts of the particular case, “according to the ordinary use of
language and dictates of common sense with due regard to the requirement I

(1) 8 TC 231.

(2) Page 381 *ante*.

(3) [1942] AC 561; 24 TC 190.

(4) [1971] 1 WLR 212; 46 TC 574 at p 589.

(5) Page 384 *ante*.

(6) Page 386 *ante*.

- A that there must be *some degree*" (my emphasis) "of permanence and publicity in the office". (The reference to publicity was made because s 18 of the Finance Act 1922 did not apply.)

The learned Lord Justice also drew attention (at page 13G)⁽¹⁾ to Lord Guthrie's observation in the Inner House in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽²⁾ [1970] SC 116:

- B "What the special commissioners had to decide was whether in the particular cases of the two companies the respondents were holders of substantive positions to which duties were attached, and which had the quality of permanency irrespective of the particular holder's tenure, or whether they merely did some work of a particular kind for the companies."

- C Lord Migdale's similar observation is noted at page 14A. It is also useful to meditate on the passages from *Davies v. Braithwaite*⁽³⁾ which Ackner L.J. quoted at pages 16 and 17 and also the Lord Justice's gloss on these passages at page 17⁽⁴⁾:

- D "I return to the character of the appointment by the Minister of the taxpayer. It was a temporary, ad hoc, appointment confined to the taxpayer. He was not appointed to a position which had an existence of its own. It had no quality of permanency about it. It was conceded that it subsisted only from the date when he was appointed to the date when the report of the inquiry was delivered to the Secretary of State."

I respectfully associate myself with the learned Lord Justice's final paragraph at page 18A to C. Oliver L.J. strikes a first blow for the Respondent at page

- E 19D⁽⁵⁾:
 "It is however worth noting that there is nothing in the Act of 1946 itself to indicate the machinery by which inquiries are to be made. There is no office of inquirer or inspector created by the Act but merely a provision authorising the Minister to 'cause to be held' the appropriate inquiries."

- F He also had criticisms to make (at page 20C⁽⁶⁾) of the Crown's heavy reliance on the public character of the duties. At page 20F the Lord Justice gives us his point of view on the characteristics of independence and permanence. After reviewing the authorities and having recognised the drafting changes, he adverts to *Commissioners of Inland Revenue v. Brander & Cruickshank* as reported in the House of Lords and says (page 23B)⁽⁷⁾: "So here, once again, emphasis is laid on the concept of continuance apart from the individual holder".

- H I think I can fairly summarise the Court of Appeal's attitude by saying that all the Judges recognised the changes since *Bater*⁽⁸⁾ and accepted the principle in *Farrell v. Alexander*⁽⁹⁾ but still considered that a degree of permanence and continuity was essential and were unwilling to disregard a clear thread of supporting opinion which ran through a long line of cases.

The characteristic of permanence need only amount to the independent existence of an office, as opposed to its incidental creation and automatic demise with the beginning and the end respectively of the appointment of an individual to perform a task. And the continuity required need have no magic

I (1) Page 387 ante. (2) 46 TC 574. (3) 18 TC 198. (4) Page 391 ante.
 (5) Page 392 ante. (6) Page 393 ante. (7) Page 395 ante. (8) 8 TC 231
 (9) [1977] AC 59.

beyond the existence of the post (subject always to its abolition *ab extra*) after the holder has left it, with the *possibility* of successor's being appointed. A

The Appellant's argument in your Lordships' House was well and faithfully outlined in advance in his printed case to which I shall now address myself. Paragraph 7 embodies the Appellant's primary submission, that the words "office or employment" are ordinary English words and should be given their "ordinary and natural meaning in modern English". I accept the proposition, but at the same time believe that it should lead us away from, and not towards, the conclusion advocated by the Appellant. I also note the reference to the Chambers Twentieth Century definition, "a function or duty: a position imposing certain duties, etc". It must be obvious that the meaning of "function or duty", however it might suit the Appellant's case, is not the meaning to be ascribed in this context. I might also note at this point the Appellant's chapter from Bacon's Abridgement which treats of the nature of an office, if only to observe that the definition which was most helpful to the Crown was too wide to have applied and therefore was not relied on by the Appellant: see also, for a similar result, *Graham v. White*(¹) 48 TC 163. Paragraphs 12 and 13 of the Appellant's case highlight the Courts' reliance in *Bater's*(²) case on rule 2 as a guide. That is a fair point, but it does not explain why the cases decided since the repeal of rule 2 in 1956 still lay stress on independent existence, a degree of permanence and a certain continuity. A better point for the Appellant, I freely admit, is that made by my noble and learned friend, Lord Bridge, that subsequent cases have not until now called for a critical approach to Rowlatt J.'s definition. Paragraph 15 discusses in detail the role of Sch 9 para 2: it strikes me (because it simply dealt with the *procedure* of assessment) that its later repeal ought not to affect the construction of the words "office or employment". B C D E

The assumption in para 17 of the case that the requirement of independent existence is derived from r 1 in the 1842 Act is not, in my opinion, justified. I refer in support to the judgments of the members of the Court of Appeal, who freely acknowledged the passing of r 1 and its successor, para 2. With regard to para 17(b), Lord Greene, M.R. was in *McMillan v. Guest*(³) [1941] 1 KB 258 (CA) specifically referring to "the office of director". Paragraph 17(d) mentions *Dale v. Commissioners of Inland Revenue*(⁴) where there was an office of trustee: Lord Normand's speech does not help the Appellant. With regard to para 17(e), I would point out that the question from *Commissioners of Inland Revenue v. Brander & Cruickshank*(⁵) (as reported in both Session Cases and Tax Cases) ends with the words "a particular task", not "a particular piece of work". In any event, the selected person is "appointed to a position" and I do not see where the point takes the Appellant. F G

Paragraph 18,

"The Appellant further submits that the concept of continuity is not only not to be found in any dictionary meaning of 'office' but introduces a concept of a sine qua non which cannot be supported. An office can be created for a particular occasion (e.g. a Coronation) or be created *ad hominem*. Although a Judge of the High Court clearly holds an office, no individual Judge has a successor or is successor to any other Judge. The same holds true for a Recorder. It is still less possible to say that a Deputy High Court Judge has a successor or that his position is other than H I

(¹) [1972] 1 WLR 874.

(²) 8 TC 231.

(³) 24 TC 190.

(⁴) 34 TC 468.

(⁵) 46 TC 574.

- A temporary and personal to himself. Yet in the Appellant's submission the Deputy High Court Judge clearly holds an office while his appointment subsists. That a Judge's marshal also holds an office was recognised by Rowlatt J. in *Ryall v. Hoare*⁽¹⁾ [1923] 2 KB 447 at page 455. Those are but a few examples of legal offices which illustrate, in the Appellant's submission, why the concept of permanence or continuity is not an essential feature of an office. The position is no different in other fields. Thus in *Pickering v. James* (1873) L.R. 8 C.P. 489 Bovill C.J. at page 496 and Brett J. at page 508 referred to the position of a presiding officer at a polling station under the Ballot Act 1872 as an office. In *Taylor v. Provan* [1975] A.C. 194 at page 205H-206A Lord Reid drew a contrast between, on the one hand, the 'office or employment' in that case which was 'created for the Appellant because of his special qualifications' and, on the other, the type of office that 'has an independent existence'."

- Where the concept of continuity is discounted, is an important part of the Appellant's argument. My observations are as follows:—(1) An office can be created for an occasion but that, in my view, involves creating an office, which can be filled by the appointing authority. (2) If the person to be appointed refuses or resigns or dies before or after taking office, one must appoint a successor or an alternative or else leave the office vacant or abolish it. That is an example of a degree of permanence or continuity, although not necessarily of long duration. The situation is not typical of the present case where the "office" can be created only by appointing someone to *do* something and where the "office" does not have to remain vacant or be abolished after the holder has gone.

The position of judge's marshal is an office, but at least a successor in this short-lived office can, if necessary, be contemplated: the office exists independently of the holder. The same is true of a presiding officer at an election.

- In *Taylor v. Provan*⁽²⁾ [1975] AC 194 the motive for the appointment was personal to the appointee, but there was an *office* of director to which he was appointed, which he could vacate and to which others had been appointed in the past and must be appointed in the future while the company existed and the law continued as it was.

- Paragraph 19 of the case seeks to say that because certain tenures of office involve no contract and some contracts do not involve holding an office, therefore the Respondent's engagement (because not contractual) involved his holding an office. The argument is fallacious because—(1) There was an oral contract in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽³⁾ and yet the taxpayers held an office; (2) The example accordingly fails to illustrate why a judge holds an office; (3) If an arbitrator does not hold an office, this is not because he is appointed by virtue of a contract between the parties and a further contract between them and the arbitrator; (4) The consultants in *Mitchell and Edon v. Ross*⁽⁴⁾ had contracts but were also holding offices or employments; (5) All employments the emoluments of which fall to be assessed under Schedule E (like the emoluments of offices) arise from contracts between employer and employee; (6) The Respondent in this case had a contract by virtue of the offer and acceptance of an engagement on agreed

(1) 8 TC 521.

(2) 49 TC 579.

(3) 46 TC 574.

(4) 40 TC 11.

pecuniary and other terms; this is a neutral factor, but not according to para 19. Paragraph 21 kept open an alternative argument that the Respondent was employed, but the Appellant did not pursue this line. The fact that he could not have hoped to succeed on this point has some relevance, because most offices, other than that of a judge, can credibly be presented as a form of employment. A

It is tempting to seek a logical solution, but this is not always reliable in tax cases. The contrast now, however, is not between public and private occupations but between trade, profession or vocation on the one hand, and office or employment on the other. We might therefore look for logical links between office and employment and should not be too ready to equate an independent contractor with an office holder, since the latter has a deemed employer and his holding of an office has much in common with employment. B C

The Appellant conceded that a private arbitrator does not hold an office within Schedule E but, in my opinion, such an arbitrator would hold at least a private office if the Appellant's main submission were correct. The mere fact that two parties agree to appoint an arbitrator in certain eventualities instead of going to Court does not, in my view, make the slightest difference to the question whether the person appointed to hold the arbitration holds an office by virtue of his appointment while he is seized of the task. He has at least a familiar name (of "arbitrator"). This, however, emphasises the importance of my second point, that a person does *not* hold a so-called office if it comes into being only as the inevitable accompaniment of the fact of the alleged holder's appointment to perform a task: the "office" has no independent existence and is not "distinct from the holder". This, I consider, is important, quite independently of the *Bater*⁽¹⁾ view of permanence and continuity. Nor do I omit to emphasise that an arbitrator under the 1950 Act (or the corresponding legislation outside England and Wales) exercises a judicial jurisdiction which for interlocutory, enforcement and appellate purposes is tied by statute to our public court system. D E

I respectfully agree that it would be unsound to deny the existence of an office or employment in every case where a post did not exhibit all the indicia postulated by Rowlatt J., but I would not regard *Taylor v. Provan*⁽²⁾ [1975] AC 194 as providing support for the Appellant. There the office was that of a director and its occupant clearly a Schedule E taxpayer. This was due to the nature of the office, and its temporary occupation by a person of particular talents for a specific, limited purpose did not provide a precedent helpful to the present Appellant. I do not overlook Lord Reid's words at pages 205H to 206A; neither do I forget what Lord Wilberforce said at page 215D: "A director with a special assignment is none the less a director". F G

The Respondent's case is not helped by reliance on s 204 of the 1970 Act or by reference to the practical difficulty, which is quite common, of assessing a taxpayer under Schedules D and E. On this point I entirely agree with my noble and learned friends. I think, however, that consideration of the position of recorders and deputy judges does not advance the Appellant's cause since, as deputy holders of an office, they are in a class of their own, sharing much of the character of a *locum tenens* which was noticed by Upjohn J. in *Mitchell and Edon v. Ross*⁽³⁾ [1960] Ch 145 at page 169: "The phrase 'locum tenens' is in fact a most apt and appropriate expression to describe the work. The H I

(1) 8 TC 231.

(2) 49 TC 579.

(3) 40 TC 11.

A specialist in doing such work is, in fact, holding the post of another. He is, for the time being, exercising the functions and holding the public office of another”.

I might just point out that the Appellant strongly relied on *Mitchell and Edon v. Ross*⁽¹⁾ and contended that the present case was a *fortiori*. This could never be so except in the limited sense that Dr. Ross and his colleagues were rightly taxed under two different Schedules although they were at all times doing their usual work of treating the sick. But that is not significant when one remembers that a person could be taxed under Schedule D in respect of two different trades or professions or under Schedule E in respect of different offices or employments. Dr. Ross was clearly occupying a part-time but permanent post in the Health Service which satisfied every criterion of the *Bater*⁽²⁾ test: see Lord Evershed, M.R. at page 522⁽³⁾. It was quite unnecessary for the Crown to advance any of the submissions which are essential to the present Appellant’s case.

Schedule D speaks of “annual profits or gains”, but Rowlatt J. in *Ryall v. Hoare*⁽⁴⁾ [1923] 2 KB 447 page 455 explains the meaning of “annual” as being appropriate to occasional earnings or even a single venture.

In approaching this problem of statutory interpretation I have kept in mind two further points. One is that the onus is on the Crown which asserts that Schedule E applies. As Lord Sterndale, M.R. said in *Bater* [1921] 2 KB 128 at page 136: “Where a question of taxation arises, the subject should be able to know clearly whether he is taxable or not”. The other is what was said by Viscount Simonds in *St. Aubyn v. Attorney-General* [1952] AC 15, at page 32 and adopted by Pearce L.J. in *Mitchell and Edon v. Ross* [1960] Ch 498, at page 526: “The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits”.

Following the example of Lord Wrenbury in *Bater’s* case [1922] 2 AC 1 at pages 30–31 and respectfully sharing his view of the difficulties of the tax legislation, I consider that my only safe course is to decide the individual case before us without showing too much concern for supposed analogies and contradictions, but remembering that the case, if decided in favour of the Crown, would provide the first example of innominate office under Schedule E.

I consider that the General Commissioners, in so far as they accepted the full *Bater* formula as their guide, misdirected themselves in law, but, on the view which I take of the interpretation of the phrase “office or employment” (which is a question of law), there is only one correct answer on the facts: the Respondent was not holding an office. The decision of the Court below should therefore be affirmed and the appeal dismissed.

Since preparing this speech I have had the opportunity of reading in draft the speeches of my noble and learned friends, Lord Wilberforce and Lord Salmon, with which I most respectfully concur.

(1) 40 TC 11.

(2) 8 TC 231.

(3) [1960] Ch 498; 40 TC 11, at p 44.

(4) 8 TC 521.

Lord Bridge of Harwich—My Lords, the important question raised by this appeal, which we are told is a test case, is what is the correct basis of assessment to income tax of the remuneration of persons appointed under statutory powers to hold public local inquiries of a kind which have become a familiar feature of the contemporary social scene and an important part of the machinery of administrative law regulating relationships between the executive and the citizen. The question depends on the construction of the relevant provisions of the Income and Corporation Taxes Act 1970. The Crown contends that such remuneration falls to be charged in respect of “any office or employment on emoluments therefrom” under Case I of Schedule E (s 181). The Respondent taxpayer contends that the tax is to be charged in respect of “profits or gains arising or accruing . . . from . . . any profession or vocation not contained in any other Schedule” under Case II of Schedule D (ss 108, 109).

The taxpayer is a civil engineer. During the years of assessment in question (1973–74 and 1974–75) he was one of a panel of some sixty persons who were invited from time to time by the Secretary of State for the Environment to hold public local inquiries. He was free to accept or refuse any such invitation. If he accepted he was paid daily fees according to the length of the inquiry with notional time added for preparatory reading, travelling time, site visits and writing his report. In respect of these earnings he was assessed to tax under Schedule E. He appealed against the assessments to the General Commissioners, who concluded that his “discharge of the duties of an inspector holding a public local inquiry did not amount to the holding of an office within the meaning of the said Case I of Schedule E as the appointment was merely a transient, indeterminate, once-only execution of a task for which he was peculiarly qualified—the nearest analogy to which was a barrister or solicitor conducting a case for a client”. They accordingly allowed the appeal. On appeal by Case Stated to the High Court, Walton J. reversed the decision of the Commissioners and restored the Schedule E assessments: [1979] 1 WLR 338⁽¹⁾. The Court of Appeal (Buckley, Ackner and Oliver L.JJ.) in turn allowed the taxpayer’s appeal: [1981] Ch 1⁽²⁾. From that decision the Crown now appeals to your Lordships’ House.

The Crown does not and could not say that the taxpayer held a continuing office in the exercise of which he held successive inquiries. On the contrary, the essence of the Crown’s case is that each separate appointment of the taxpayer to hold a public local inquiry constituted him the holder of an office created *ad hoc* by the appointment itself and which subsisted only from the time of the appointment until the duties of the office were completed by the submission to the Secretary of State of the taxpayer’s report. Herein lies the essence of the controversy, for it is argued by the Crown and accepted in the decision of Walton J. that the term “office” as used in Schedule E in the Act of 1970 is capable of embracing such a temporary *ad hoc* appointment, whereas the Court of Appeal, on the other hand, giving more precise and explicit expression to the view which no doubt underlies the General Commissioners’ decision, have held it to be an essential attribute of an “office” in this context that it should, in the language of Buckley L.J., “have a sufficient degree of continuance to admit of its being held by successive incumbents”.

It seems probable that during the two years in question the taxpayer held inquiries of various kinds under the provisions of different statutes. But your

(¹) Pages 371–8 *ante*.

(²) Page 378, *ante*.

- A Lordships must perforce proceed on the assumption that nothing turns on any differences in the statutory provisions under which he was from time to time appointed, since both parties invite your Lordships to accept as typical and to treat as decisive of the appeal a particular appointment of the taxpayer, made in June 1975, under s 5 and para 4(2) of the First Schedule to the Acquisition of Land (Authorisation Procedure) Act 1946 to hold a public local inquiry for the purpose of hearing objections and representations with regard to a proposed compulsory purchase of land required for a trunk road, such inquiry being governed by The Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967 (S.I. No. 720 of 1967). It is important to consider the powers and duties of a person so appointed. He can compel witnesses to attend, to give evidence and to produce documents. If they refuse they are subject to penalties. In the conduct of the inquiry and in making his report he is under a duty to act independently, impartially and fairly. Subject to the express provisions of the 1967 Rules, the procedure at the inquiry is in his discretion. After the inquiry he is under a duty to make his report to the Secretary of State, which is to include his findings of fact and his recommendations, if any, or his reasons for not making any recommendations. In short, his function is clearly, if not judicial, at least quasi-judicial in character. It should be added that under the relevant statutory provisions the person appointed to hold the public local inquiry has no designation or title and under the 1967 Rules he is simply referred to as the "appointed person". The commonly used appellation "inspector" finds no place in this statutory code. I mention this, but I do not myself attach any significance to the innominate character of the office, if office it be.

The relevant definition of the word "office" in the Oxford English Dictionary is:

- "A position or place to which certain duties are attached, especially one of a more or less public character; a position of trust, authority, or service under constituted authority; a place in the administration of government, the public service, the direction of a corporation, company, society, etc."

- At first blush, it seems to me that the appointed person holding a public local inquiry under the provisions to which I have referred occupies an "office" which falls fairly and squarely within each of the three limbs of this definition. He occupies a position to which duties of a public character are attached. He is in a position of authority. He holds a place in the administration of government. To this I would add, as reinforcing my view that he holds an "office" in the ordinary sense of the word, three of the four factors which weighed with Walton J. First, the "appointed person" has no employer in any ordinary sense; he exercises his functions quite independently. Secondly, he is not acting in any personal capacity, but in a capacity which derives its existence wholly from, and is clothed with powers and duties by, his statutory appointment; this embraces under a single head the factors listed as (2) and (3) in Walton J.'s enumeration at [1979] 1 WLR 338 at page 344⁽¹⁾.

- I confess that, with all respect, I do not share Buckley L.J.'s expressed inclination, "unguided by authority", to understand the word "office" in the context of Schedule E as connoting "a post which can be recognised as existing, whether it be occupied for the time being or vacant, and which, if occupied, does not owe its existence in any way to the identity of the

(¹) Pages 375-6 ante.

incumbent or his appointment to the post". If "office" is given its ordinary meaning, then, in my opinion, the taxpayer held an office whenever he was appointed to hold a public local inquiry and the fees paid to him were the emoluments of that office. Conversely, when holding such inquiries, he was certainly not practising his profession as a civil engineer and the fees could only be brought within the ambit of Schedule D Case II on the footing that the holding of statutory inquiries is itself a separate "vocation", which involves, to my mind, an unacceptable straining of language.

However, it is not for the taxpayer to establish the basis on which he is properly assessable. If he can successfully impugn the Schedule E assessments, he is entitled to have the decision of the Court of Appeal in his favour upheld. It remains, therefore, to consider whether either the authorities on which the Court of Appeal relied or anything in the provisions governing assessments under Schedule E, as now embodied in the Act of 1970, lead to the conclusion that the word "office" in Schedule E is to be construed as having some more restricted meaning than that which it ordinarily bears.

To understand the authorities it is necessary to bear in mind certain aspects of the relevant history of income tax legislation. Under the Act of 1842 tax was charged under Schedule (D) on "the annual profits or gains arising or accruing... from any profession, trade, *employment* or vocation"; it was charged under Schedule (E) on "every *public* office or employment of profit". The added emphasis in each case is mine. These charging words and the distinction they drew between the two Schedules survived unaltered in the consolidating Income Tax Act 1918. The Finance Act 1922 made the important change of transferring from Schedule D to Schedule E, with exceptions which are immaterial for present purposes, the charge to tax on the profits of any "office or employment". Hence the public element in Schedule E ceased to be of importance and ever since 1922 it is again sufficient for present purposes to say that, although the form of Schedule E was recast by the Finance Act 1956, the basis of charge under the Schedule has remained in substance unaltered.

The first of the "Rules for charging the said duties" under Schedule (E) in the Act of 1842 is of crucial importance. It provides, so far as material:

"The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule (E)... and each assessment in respect of such offices or employments shall be in force for one whole year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the Person for the time having or exercising the same; provided that the Person quitting such Office or Employment, or dying within the Year, or his Executors or Administrators, shall be liable for the Arrears due before or at the Time of his so quitting such Office or Employment, or dying, and for such further Portion of Time as shall then have elapsed, to be settled by the respective Commissioners, and his Successor shall be repaid such sums as he shall have paid on account of such Portion of the Year as aforesaid..."

The substance of this rule reappeared in the consolidating Acts 1918 and 1952, but was finally repealed, save in so far as it preserves the liability of personal representatives for unpaid tax, by the Finance Act 1956.

A In *Great Western Railway Co. v. Bater*⁽¹⁾ [1920] 3 KB 266 (Rowlatt J.); [1921] 2 KB 128 (Court of Appeal); [1922] 2 AC 1 (House of Lords) the railway company had been assessed to tax in respect of the salary of a clerk in the company's employ. The Income Tax Act 1860, s 6, made the employing company liable for "the duties payable under Schedule (E) in respect of all offices and employments of profit held in or under any railway company". As your Lordships' House eventually held, Lord Buckmaster dissenting this provision, on its true construction, only applied to offices and employments having the necessary public character to bring them within Schedule (E) of the Act of 1842 and the *ratio* of the decision was that the employment of the clerk in question lacked that attribute. But the importance of the case for present purposes is in the observations of Rowlatt J. at first instance and of Lord Atkinson in this House. To appreciate their true significance it is necessary to cite the relevant passages at some length. Rowlatt J. said at pages 273–274⁽²⁾:

B "But it is contended, and this is the real point in the case, that this man Hall is not the holder of an office or employment of profit at all. It is said that he is just one of a number of clerks. I gather that is the point, although it is not specifically so stated in the case before me. It is said that the position which he holds is not the sort of office that is referred to in this Schedule, and it is pointed out that under rule 1 of Sch. (E) in the Act of 1842 the assessment is to be made for a year in respect of the office, and that it shall be in force for a whole year and levied without any new assessment, notwithstanding a change has taken place in the office or employment, on the person having or exercising the same. In this case that would not have effect, because the assessment would be on the railway company. Then it is pointed out that in the case of a man dying or leaving the office he is responsible for the proportion of arrears and the proportionate part of the current year. It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain things, and the so-called office or employment was merely the aggregate of the activities of the particular man for the time being. I myself think that that contention is sound, but having regard to the state of the authorities I do not think I ought to give effect to that contention. My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office."

Lord Atkinson, at pages 14 and 15, quoting the important provisions of the first rule under Schedule (E) in the Act of 1842, comments on them as follows⁽³⁾:

I "That is, the tax for the year shall be assessed upon the person holding the office or exercising the employment at the time the assessment is made. A proviso is then introduced adjusting, when the change

(1) 8 TC 231.

(2) [1920]3 KB 266; 8 TC 231, at p 235.

(3) [1922] 2 AC 1; 8 TC 231, at pp 245–6.

contemplated has taken place, the burden of the tax between the persons who together have filled the office or exercised the employment during the entire year of assessment. . . Thus the entire year of assessment seems to be treated as a unit of service, and the salary as a unit of recompense, not an aggregate of a number of smaller sums payable at different times, and each recompensing the service rendered during an independent fraction of the year. Again, the word 'successor' is very significant. It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other. Employment of profit, if it be not identical with office, is thus treated as something closely akin to it. I fully concur in the opinion happily expressed by Rowlatt J. in the following passage of his judgment."

And he quotes from the passage I have already cited, beginning at the words "It is argued. . ."

It is especially to be noted that the opinion of Rowlatt J., endorsed by Lord Atkinson, that what was required under Schedule (E) of the Act of 1842 was "a subsisting, permanent, substantive position which had an existence independent of the person who filled it" applied alike to an office or an employment. It is also clear, to my mind, that they were constrained to this opinion solely by the language of the rule on which they expressly relied.

In *McMillan v. Guest*⁽¹⁾ [1942] AC 561 there are observations in the speeches of Lord Atkin, Lord Wright and Lord Porter which in effect adopt, expressly or by implication, the view of what constitutes an office under Schedule E derived from Rowlatt J. and Lord Atkinson in *Bater's*⁽²⁾ case. But since it was there undisputed that the taxpayer held an office in what I may call the *Bater* sense and the point presently at issue for your Lordships' decision was, therefore, never argued, I cannot see that these dicta add any independent weight to what was said in *Bater's* case.

Similar considerations apply to the dictum of Harman L.J. in *Mitchell and Edon v. Ross*⁽³⁾ [1960] Ch 498, at page 530, where he observed: "An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt J. in *Great Western Railway Co. v. Bater* and approved by Lord Atkin in *McMillan v. Guest*."

Finally, in *Commissioners of Inland Revenue v. Brander & Cruickshank*⁽⁴⁾ [1971] 1 WLR 212, where your Lordships' House affirmed the Special Commissioners and the Court of Session in holding that a firm of advocates employed as registrars of a number of companies were, as such, the holders of offices whose emoluments were assessable under Schedule E, Lord Morris of Borth-y-Gest said at page 215⁽⁵⁾:

"A duty is imposed upon a company to keep a register of members (Companies Act 1948, s.110). Even though the Companies Act does not require that there should be an appointment as registrar, a company must arrange that some person or persons should on its behalf perform the statutory duties of maintaining its register. In doing so, it may establish a

(1) 24 TC 190.

(2) 8 TC 231.

(3) 40 TC 11.

(4) 46 TC 574.

(5) *Ibid*, at p 589.

- A position which successively will be held by different persons. If it does so the company may have created what could rationally for income tax purposes be called an office. In *McMillan v. Guest*⁽¹⁾ [1942] A.C. 561 Lord Atkin, while pointing out that there is no statutory definition of 'office', was prepared to accept what Rowlatt J. had said in *Great Western Railway Co. v. Bater*⁽²⁾ [1920] 3 K.B. 266, 274 (as adopted by Lord Atkinson [1922] 2 A.C.I, 15) as being a generally sufficient statement of meaning. Rowlatt J. had referred to 'a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders'."
- B

- C It will thus be seen that all the relevant authorities hark back to *Bater's* case. Your Lordships have no need to quarrel with any decision that the holder of an office which *does* exhibit the *Bater* criteria of a Schedule E office is properly assessable under Schedule E. But there is certainly no case which establishes the converse of that proposition. I hope I can say without any disrespect that the endorsement of the opinion of Rowlatt J. and Lord Atkinson in all the cases following *Bater's* case, has been quite uncritical, since
- D there has been, so far as I can discover from any report we have looked at, no occasion before the instant case when any Court or your lordships' House has been invited to criticise that opinion, still less to re-examine the foundation on which it rests to see if it is still valid as applied to the phrase "office or employment" in Schedule E in the form it assumed in 1956, which reappears in the consolidating Act of 1970.

- E It is precisely such a re-examination that your Lordships now have to undertake. It leads, in my opinion, inevitably to the conclusion that the opinion, is no longer good law. The rule on which Rowlatt J. and Lord Atkinson based their interpretation has gone. Moreover, now that Schedule E embraces all employments, it surely would be absurd to suggest that "employment" under the Schedule can be limited to "a subsisting, permanent, substantive position which has an existence independent of the person who fills it". If that construction no longer applies to "employment" in Schedule E, I can see no logic whatever in continuing to apply it to "office". So far as authority is concerned, therefore, your Lordships are, in my opinion, wholly unconstrained and free to give to the word "office" its ordinary dictionary meaning.
- F

- G Mr. Michael Nolan Q.C., for the taxpayer, sought to support the restricted interpretation of "office" in Schedule E, independently of authority, by reference to its context in the Act of 1970. He referred to s 204. It is pursuant to regulations made under this section that the familiar tax tables are prepared which govern the deduction of tax under the P.A.Y.E. system from emoluments assessable under Schedule E. He relied in particular on
- H s 204(3) which provides:

- I "The said tax tables shall be constructed with a view to securing that, so far as possible—(a) the total income tax payable in respect of any income assessable under Schedule E for any year of assessment is deducted from such income paid during that year, and (b) the income tax deductible or repayable on the occasion of any payment of, or on account of, any such income is such that the total net income tax deducted since the beginning of the year of assessment bears to the total income tax

(1) 24 TC 190.

(2) 8 TC 231.

payable for the year the same proportion that the part of the year which ends with the date of the payment bears to the whole year.” A

He pointed out, rightly, that there would be great practical difficulty in determining accurately in advance the appropriate P.A.Y.E. coding to regulate deductions from the emoluments of an office holder if those emoluments were irregular and unpredictable, especially when other relevant factors, e.g. the office holder’s tax liability in respect of other income assessable under Schedule D, were unknown at the time when the deductions had to be made. It is argued that the necessity to avoid this practical difficulty should lead us to the conclusion that a person in the position of the taxpayer in this case cannot be the holder of a series of offices under Schedule E. B

The argument in my opinion, loses most, if not all, of its force if the Crown can point to other undoubted holders of offices under Schedule E whose position is such as to give rise to the same practical difficulty in relation to P.A.Y.E. deductions. This leads me to consider the position of recorders. No one could doubt that the recorder of a borough before the Courts Act 1971 was the holder of an office under Schedule E. Recorders appointed under the Courts Act 1971 are in a somewhat different position. Their appointment is for a specific term: s 21(3). Their jurisdiction is not, like that of the old recorder, confined to any one place. They assume an obligation to be available to sit in the Crown Court for a minimum number of days in a year (normally twenty) though in practice they may not be called on to sit, or may be excused from sitting, for this minimum, or conversely may sit for many more days. Though the point was not formally conceded, it was not seriously argued that these latter day recorders are not the holders of offices under Schedule E, as, in my opinion, they clearly are. the practical difficulty of determining the appropriate P.A.Y.E. coding of recorders must be no less acute than it would be in the case of persons in the position of the Respondent taxpayer. Hence I remain unimpressed by Mr. Nolan’s argument based on s 204 of the Act of 1970. C D E F

In considering, in the course of argument, the position of recorders, your Lordships were naturally also invited to consider the position of deputy High Court and Circuit Judges. These are appointed under s 24 of the Courts Act 1971 by the Lord Chancellor and the appointment may be “during such period or on such occasions as he thinks fit”. It is clear that an occasional appointment may be, and sometimes is, made ad hoc for the trial of a single case. Under r 12 of Sch 9 to the Income Tax Act 1952 the deputy holder of an office was expressly brought within Schedule E. But this provision has since disappeared from the code. I am not sure what, if any, significance to attach to this. But I cannot doubt that a deputy High Court or Circuit Judge, whether appointed for a period, or ad hoc, to conduct a particular trial, is the holder of an office under Schedule E. I appreciate, of course, that this conclusion may be justified on the footing that the deputy Judge occupies for the time being what is essentially the same office as the regular Judge and thus is by no means decisive of the issue in this appeal. G H

I do not think any real assistance is to be gained by considering examples of various statutory referees or arbitrators whose appointment is necessarily ad hoc. They may provide more or less apt analogies with “appointed persons” under the code your lordships are considering, but they are analogies of a kind calculated to beg, rather than to answer the question. Nor do I think I

- A that the Respondent can take much comfort from the concession made by the Crown, rightly in my view, that a private arbitrator does not hold an office under Schedule E. The conduct of private arbitrations may be largely regulated by statute, but the arbitrator derives his jurisdiction to decide the dispute referred to him exclusively from the consent of the parties and herein lies the critical distinction between his position and that of a person exercising
- B a judicial or quasi-judicial jurisdiction which derives from a statutory appointment.

- Looking at the matter broadly and considering, in so far as one may properly do so when construing a taxing statute, the policy of the Act, I can certainly see no sensible reason which would make it appropriate to differentiate the basis of assessment to income tax of persons remunerated out
- C of public funds for performing public, statutory, judicial or quasi-judicial functions on an occasional basis, according to whether they hold a continuing nominal appointment in which they act from time to time, or whether their names are on a panel from which they are chosen from time to time and appointed ad hoc to act on each occasion.

- All these considerations have led me to the conclusion that there is no
- D reason to construe the word "office" in Schedule E under the Act of 1970 otherwise than in its ordinary, dictionary meaning and for the reasons I have earlier expressed I am of opinion that that meaning is apt to describe the position of the Respondent on appointment to hold a public local inquiry under the statutory provisions in question. I would accordingly allow the appeal and restore the order of Walton J.

- E *Appeal dismissed with costs.*

[Solicitors:—Solicitor of Inland Revenue;
Messrs. Lovell White & King.]
