avoid a superficial or perfunctory approach to the exercise of the power conferred upon them. If a judge is in doubt, he would be wise to offer the applicant an opportunity of supplementing the evidence (as the Court of Appeal did in *Hillier* v. *Hillier and Latham* [1958] P. 186 and *C.* v. *C.* [1980] Fam. 23). Finally, a judge should always state his reasons for his decision. In the exercise of a power operating on such "subjective" material as the degree of hardship suffered by an applicant review of his decision by an appellate court is unlikely to be effective unless the court is told the reasons which led the judge to the conclusion which in fact he reached.

I would, therefore, dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I agree with it and for the reasons he gives I would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, I agree entirely with the speech of my noble and learned friend, Lord Scarman, which I have had the advantage of reading in draft. I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Scarman. I find myself wholly in agreement with it, and, for the reasons which he gives, I too would dismiss the appeal.

Appeal dismissed.
Costs of wife to be taxed in accordance with provisions of Schedule 2 to Legal Aid Act 1974.

Solicitors: *Daniel Davies & Co.*

M. G.

[HOUSE OF LORDS]

EDWARDS (INSPECTOR OF TAXES) . . . . APPELLANT

AND

CLINCH . . . . . RESPONDENT

1981 June 16, 17, 18; Oct. 22

Lord Wilberforce, Lord Salmon, Lord Edmund-Davies, Lord Lowry and Lord Bridge of Harwich

Revenue—Income tax—"Office"—Inspector appointed to hold public local inquiries—Appointment for specified inquiry—Remuneration by daily fees—Whether holding "office"—Whether fees received for acting as inspector taxable under Schedule E or Schedule D—Income and Corporation Taxes Act 1970 (*c.* 10), *s.* 181

Section 181 of the Income and Corporation Taxes Act 1970 provides:

"(1) The Schedule referred to as Schedule E is as follows:—Schedule E 1. Tax under this Schedule shall be charged in respect of any office or employment on emoluments therefrom which fall under one, or more than one, of the following cases . . ."

The taxpayer, a chartered civil engineer, was one of a panel of persons whom the Department of the Environment invited from time to time to hold public local inquiries into matters for which the Secretary of State for the Environment was responsible. When he accepted an invitation to undertake such an inquiry he would receive a daily fee together with a travelling and subsistence allowance. He had discretion whether to accept or refuse any invitation to hold an inquiry. Before 1973 he was assessed to income tax under Schedule D in respect of all such fees he received, but thereafter the revenue decided to change their practice and assessed him under Schedule E, thus bringing him within the provisions and regulations for P.A.Y.E. deductions. On the taxpayer's appeal against assessments made under Case 1 of Schedule E for 1973–74 of £6,678 and for 1974–75 of £11,579, the general commissioners upheld his argument that, when discharging the duties of an inspector holding an inquiry, he was not the holder of an "office" within the meaning of section 181 of the Act of 1970 and had thus been incorrectly assessed. Walton J. allowed an appeal by the Crown, but the Court of Appeal on appeal by the taxpayer reversed his decision.

On appeal by the Crown:—

Held, dismissing the appeal (Lord Edmund-Davies and Lord Bridge of Harwich dissenting), that an "office," in the context of Case I of Schedule E, (*per* Lord Wilberforce) involved a degree of continuance (not necessarily continuity) and of independent existence, connoting a post to which a person could be appointed, but not necessarily being capable of permanence or prolonged or indefinite existence; (*per* Lord Salmon) meant "a subsisting, permanent, substantive position which has an existence independent of the person who fills it"; (*per* Lord Lowry) involved a degree of permanence and continuity amounting, as to permanence, to no more than the independent existence of an office, as opposed to its incidental creation and automatic demise with the beginning and end respectively of the appointment of an individual to perform a task and as to continuity to no more than the existence of the post (subject always to its abolition ab extra) after the holder had left it, with the possibility of a successor's being appointed; and that in the case of the taxpayer each appointment had been personal to him; it had been temporary and ad hoc; and, although the taxpayer's duties were statutory, no office of inspector was created by the relevant legislation; and, accordingly, the taxpayer was not the holder of an "office" within Case I of Schedule E (post, pp. 861C–E, 862A–E, 865G–H, 866D–E, 876A–C, 879H—880A).

Great Western Railway Co. v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1, H.L.(E.) considered.

Decision of the Court of Appeal [1981] Ch. 1; [1980] 3 W.L.R. 521; [1980] 3 All E.R. 278 affirmed.

The following cases are referred to in their Lordships' opinions:

Dale v. *Inland Revenue Commissioners* [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671; 34 T.C. 468, H.L.(E.).

Davies v. *Braithwaite* [1931] 2 K.B. 628.

Farrell v. *Alexander* [1977] A.C. 59; [1976] 3 W.L.R. 145; [1976] 2 All E.R. 721, H.L.(E.).
Graham v. *White* [1972] 1 W.L.R. 874; [1972] 1 All E.R. 1159; 48 T.C. 163.
Great Western Railway Co. v. *Bater* [1920] 3 K.B. 266; [1921] 2 K.B. 128, C.A.; [1922] 2 A.C. 1, H.L.(E.).
Inland Revenue Commissioners v. *Brander & Cruickshank*, 1970 S.C. 116; [1971] 1 W.L.R. 212; [1971] 1 All E.R. 36; 1971 S.C.(H.L.) 30; 46 T.C. 574, H.L.(Sc.).
McMillan v. *Guest* [1941] 1 K.B. 258; [1940] 4 All E.R. 452, C.A.; [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190, H.L.(E.).
Mitchell and Edon v. *Ross* [1960] Ch. 145; [1959] 3 W.L.R. 550; [1959] 3 All E.R. 341; [1960] Ch. 498; [1960] 2 W.L.R. 766; [1960] 2 All E.R. 213, C.A.; [1962] A.C. 814; [1961] 3 W.L.R. 411; [1961] 3 All E.R. 49, H.L.(E.).
Ryall v. *Hoare* [1923] 2 K.B. 447; 8 T.C. 521.
St. Aubyn v. *Attorney-General* [1952] A.C. 15; [1951] 2 All E.R. 473, H.L.(E.).
Taylor v. *Provan* [1975] A.C. 194; [1974] 2 W.L.R. 394; [1974] 1 All E.R. 1201; 49 T.C. 579, H.L.(E.).

The following additional cases were cited in argument:

Bushell v. *Secretary of State for the Environment* [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608, H.L.(E.).
Ingle v. *Farrand* [1927] A.C. 417; 11 T.C. 446, H.L.(E.).
Pickering v. *James* (1873) L.R. 8 C.P. 489.

APPEAL from the Court of Appeal.

This was an appeal by the Crown by leave of the Court of Appeal (Buckley, Ackner and Oliver L.JJ.) from their decision on May 9, 1980, allowing an appeal by the taxpayer, Frank Howard Clinch, from a decision of Walton J. on November 29, 1978 [1979] 1 W.L.R. 338. By his decision, Walton J. allowed an appeal by the Crown on a case stated by the Commissioners for the General Purposes of the Income Tax. The commissioners had allowed the taxpayer's appeal against assessments made on him under Case I of Schedule E for 1973–74 and 1974–75 in the sums of £6,678 and £11,579 respectively, holding that the taxpayer was not the holder of an "office" within the meaning of Case I of Schedule E and, accordingly, should be assessed to income tax under Schedule D and reducing the assessments to £4,871 and £4,651 accordingly. Walton J. reversed that decision, and the Court of Appeal reversed Walton J.'s decision, giving the Crown leave to appeal on undertakings as to costs.

The facts are set out in their Lordships' opinions.

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*

* Reporter's note. Numbered paragraphs are summarised extracts from the Crown's printed case referred to by Lord Lowry, post, p. 876D et seq. Subsequent unnumbered paragraphs refer to oral argument before the committee.

Dictionary; other dictionaries, e.g. *Chambers' 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.).

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.

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* [1920] 3 K.B. 266, 274.

11. In the House of Lords, those words were referred to with approval only by Lord Atkinson [1922] 2 A.C. 1, 15; the ratio decidendi of that case was 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* [1927] A.C. 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."

13. The feature of the statutory context that influenced his statement was, as he said, contained in section 146 of the Income Tax Act 1842. By section 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 paragraph 2 of Schedule 9 in the Income Tax Act 1952. It was finally repealed in 1956, and not race of the concept of continuity or *succession* is to be found in the Act of 1970.

14. The rule was specifically relied on by Rowlatt J. as the basis of his interpretation. Similarly, Lord Atkinson [1922] 2 A.C. 1, 14, when adopt-

ing 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.

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 are based on words not contained in the later Act.

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, 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 (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 section 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 section 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 Schedule 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 paragraph 1. It could not seriously be argued from this that the scope of paragraph 2 as well as that of paragraph 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 section 10 of the Finance Act 1956, which completely recast the Schedule E charge on offices and employments. 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. 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 A.C. 1 in *Graham* v. *White* [1972] 1 W.L.R. 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* [1942] A.C. 561, 567 Lord Wright cited with approval the first limb of the dictionary definition quoted in paragraph 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.) (b) In the same case in the Court of Appeal [1941] 1 K.B. 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* [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. *Inland Revenue Commissioners* [1954] A.C. 11, 26 Lord Normand, in considering whether a trusteeship was an "office," said that "office" was an 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) *Inland Revenue Commissioners* v. *Brander & Cruickshank*, 1970 S.C. 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 was 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 W.L.R. 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* [1923] 2 K.B. 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) L.R. 8 C.P. 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* [1975] A.C. 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

A 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 *Inland Revenue Commissioners* v. *Brander & Cruickshank*, 1970 S.C. 116, and in appropriate cases it too may be of assistance. It illustrates why, B 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 C character as a part of the machinery of the government of the country. Moreover, he held a position recognised 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 arise 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 D 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 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 E 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 F whether each of the taxpayer's appointments constituted an " 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 parti- G cular 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 " H 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.

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. A

23/24. The understanding of the Court of Appeal [1981] Ch. 1, 11H—12A on which their view to the contrary was based conflicts with facts as found by the commissioners. Paragraph 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 B 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] A.C. 75.

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 C 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 result- D ing decision has been quashed by the court, or because some aspect requires further investigation in the light of new circumstances.

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 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 E 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 barrister is not an exact analogy with the taxpayer: a barrister appears for a client. The commissioners are saying that if an appoint- F ment 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 G 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 H 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.

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. The rules flow from the appointment; they are not laid down for the particular appointment.

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* [1962] A.C. 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.

The ordinary meaning of "office" should be applied. As Buckley L.J. said [1981] Ch. 1, 5, 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 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* [1920] 3 K.B. 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 section 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.

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 or continuity, as a requirement, comes from *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1921] 2 K.B. 128; [1922] 2 A.C. 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; it was a decision on that wording. Also, Rowlatt J. [1920] 3 K.B. 266, 274 was speaking of "office or employmeut" 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* [1923] 2 K.B. 447 (a judge's marshal) (Rowlatt J.); a manager or acting manager: *per* Lord Sterndale M.R. in *Bater*; *Graham* v. *White* [1972] 1 W.L.R. 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* [1975] A.C. 194 that that was an office, albeit ad hoc: see *per* Lord Reid, at pp. 205H—206A.

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 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] A.C. 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* [1960] Ch. 145; [1962] A.C. 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 p. 165) on the plain meaning of the words.

The Court of Appeal drew too much from *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 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 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 sections 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 P.A.Y.E. 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.

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 section 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 [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.

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, at pp. 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.

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* [1922] 2 A.C. 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 Schedule 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 P.A.Y.E. 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* [1942] A.C. 561, 564, 566, 567 and Harman L.J. in *Mitchell and Edon* v. *Ross* [1960] Ch. 498, 530 approached the question by reference to the ordinary meaning of words, which has remained the same. (3) The decision in *Inland Revenue Commissioners* v. *Brander & Cruickshank* [1971] 1 W.L.R. 212 was arrived at by reference to a requirement of continuity and succession (see *per* Lord Morris of Borth-y-Gest, at p. 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).

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 [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 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 sections 181 and 204 of the Income and Corporation Taxes Act 1970 and regulations 6 and 7 of the Income Tax (Employment) Regulations 1973, from which it is to be inferred that the offices to which section 181 applies are those that are generally suitable for the P.A.Y.E. 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 P.A.Y.E. 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 informally 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 Schedule 9, rr. 12 and 15, which disappeared in 1956 when it was superseded by the P.A.Y.E. 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. 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* [1931] 2 K.B. 628 and *Great Western Railway Co.* v. *Bater* [1922] 2 A.C. 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. [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* [1960] Ch. 145, 163, 165 (Upjohn J.); [1960] Ch. 498, 521 (Lord Evershed M.R.) was quite different; the case is not helpful to the Crown on those facts.

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 *Inland Revenue Commissioners* v. *Brander & Cruickshank* [1971] 1 W.L.R. 212 and *Taylor* v. *Provan* [1975] A.C. 194, 205 (Lord Reid), 209D–E (Lord Morris of Borth-y-Gest); 215 (Lord Wilberforce).]

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.

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] A.C. 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* [1920] 3 K.B. 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* [1960] Ch. 498, 521.

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 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.

Their Lordships took time for consideration.

October 22. 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.

The word "office" has been in the income tax legislation all along: the Income Tax Act 1842, Schedule (E.) 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 rule 1 of Schedule (E.) in the Act of 1842 (quoted by my noble and learned friend Lord Bridge of Harwich) 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 Act of 1842. 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* [1920] 3 K.B. 266, 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.

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 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.

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 rule 1. I do not, for myself, regard the disappearance of rule 1,

and its successor paragraph 2 of Schedule 9 to the Income Tax Act 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 section 204 of the Income and Corporation Taxes Act 1970. 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 that 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, 5. 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.

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 appellant, 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 appellant] was peculiarly qualified— . . ." —adding an analogy which I do not find appropriate.

The revenue does not contend that the appellant, who was a member of a panel, and was called on to conduct a number of inquiries, held one office. 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.

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:

> ". . . 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. [1981] Ch. 1, 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., at p. 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., at p. 19 (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 inquiry by another individual equally appointed ad hoc, and on terms which fall to be separately negotiated with him": *per* Oliver L.J. at p. 23.

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

Each of the Lords Justices moreover carefully examined and, in my opinion effectively, answered the four points on which Walton J. relied in order to decide for the revenue, 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 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.

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 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 section 108 (1) (*a*) (ii) and section 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 (section 181 of the Act of 1970) 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 [1979] 1 W.L.R. 338,

342 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.

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 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.

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.

In *McMillan* v. *Guest* [1942] A.C. 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 p. 564:

> "It is necessary to consider whether the appellant (1) held an office; . . . 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* [1920] 3 K.B. 266, 274, adopted by Lord Atkinson [1922] 2 A.C. 1, 15, 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."

Lord Roche agreed with Lord Atkin. Lord Wright said, at p. 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, at p. 567, that he imagined that the words in *Bater's* case were deliberately left vague and that the words should be applied

> ". . . 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."

I shall later return to Lord Wright's speech.

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 *Inland Revenue Commissioners* v. *Brander & Cruickshank* [1971] 1 W.L.R. 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 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 section 38 (3) of the Finance Act 1960); and, but for section 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 T.C. 574, Lord Guthrie and Lord Migdale treated the words of Rowlatt J. in *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266, 274 as a generally sufficient statement of the meaning of the word "office." Lord Guthrie said, at p. 584:

> "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, at p. 587:

> "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 [1971] 1 W.L.R. 212, 215 said:

> "Even though the Companies Act [1948] 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* [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 K.B. 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* [1942] A.C. 561, Lord Wright said, at p. 566:

> "To hold that the director of a company . . . does not have an office within the meaning of [Schedule E] 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 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 (who 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. [1981] Ch. 1, 17–18:

> "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" (post, p. 882A–B). I agree with Ackner L.J. [1981] Ch. 1, 15 that

> ". . . 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" (*per* Walton J. [1979] 1 W.L.R. 338, 344) means that, once having accepted the appointment, the taxpayer's conduct of the inquiry was, to some extent, controlled and circumscribed by the relevant statutes. The obligation to observe statutory requirements cannot, however, in itself, create an office.

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.

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 section 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.

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 section 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.

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 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* [1920] 3 K.B. 266, and particularly to his adoption, at p. 274, of the submission 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, . . ."

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 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 considered which in my judgment completely fitted within the everyday understanding of the term, notwithstanding that they were transient in their very nature

A 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 he has by no means exhausted the list. Walton J. rightly said [1979] 1 W.L.R. 338, 345:

> "... whilst the permanency of the duties to be discharged may well, B 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."

C My Lords, learned counsel for the respondent submitted that the provisions of section 204 of the Act of 1970 themselves indicate that "office" must be given a meaning severely restricted on the lines indicated by Rowlatt J. He said that subsection (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 D 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 provide its own dictionary by defining in a special sense a word of such everyday use?

E 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 F 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.

G 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 H the point at issue.

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*:

> "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 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 paragraph 7 of Schedule 9 to the Income Tax Act 1952 and now section 181 (1) and Schedule E, Case I of the Act of 1970, 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 Act of 1970: see sections 182, 187 and 188 and Schedule 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 not readily recognise. Much less, I suggest, would he be likely to think that, after carrying out 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 meanings 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.

A 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 *Great Western Railway Co.* v. *Bater* [1922] 2 A.C. 1 was that Mr. Hall held no office and that his employment was not public and that, in so far as other B reasons were advanced, their Lordships were strongly influenced by rule 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 C 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 D 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 paragraph 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

E > "... 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 F 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 G the commissioners' decision appears to be so based. Where the appellant's argument goes astray, in my estimation, is in submitting, in effect: "The *Bater* test is wrong and was accepted by the commissioners. Therefore we are right."

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 H Crown. The learned judge [1979] 1 W.L.R. 338, 344E set out four considerations which strongly appealed to him as showing that a person appointed to conduct an inquiry under the Acquisition of Land (Authorisation Procedure) Act 1946 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 [1981] Ch. 1 by Buckley L.J., at pp. 10F–12A, by Ackner L.J., at pp. 15E–16B and by Oliver L.J., at pp. 23C–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. *Inland Revenue Commissioners* [1954] A.C. 11 which Walton J. cited at p. 343G. I note that he again mentions trustees at p. 346G and reverts to the fallacy of "not employed, therefore holding office" at p. 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.

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.

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 [1979] 1 W.L.R. 338, 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 p. 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.

If the course of the appeal in your Lordships' 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* test (*Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1). If I may indulge in a metaphor from the occupation of gold-mining, I would say (without any disrespect, I hope) that the *Bater* 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 had an existence independent of the person who filled it, . . ." ([1920] 3 K.B. 266, 274) 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 said [1922] 2 A.C. 1, 14:

> " 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 and learned friend, Lord Bridge, I do not forget the words of Harman L.J. in *Mitchell and Edon* v. *Ross* [1960] Ch. 498, 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 *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266, 274 and approved by Lord Atkin in *McMillan* v. *Guest* [1942] A.C. 561."

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. [1981] Ch.1, 5:

> " 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 [*Farrell* v. *Alexander* [1977] A.C. 59, 73] 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 may no longer be appropriate."

The learned Lord Justice carried this idea forward to his discussion of *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1, 7: " 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 *Oxford English Dictionary* definition at p. 5, 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." A

It is fair comment to say that this view does not appear to have been dictated by the *Bater* test or the now repealed rule 1 of the 1842 Schedule (E.).

I also consider helpful the reflections of Buckley L.J., at p. 6:

" 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 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 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." B C D

He then, at p. 8, takes note of Lord Porter's observation about the position of the non-executive director in *McMillan* v. *Guest* [1942] A.C. 561, 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.' " E Again, at p. 9, he has neatly extracted from the speech of Lord Morris of Borth-y-Gest an important view of *Inland Revenue Commissioners* v. *Brander & Cruickshank* [1971] 1 W.L.R. 212, 215:

" ' Even though the Companies Act [1948] 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.' " F

After a review of the cases Buckley L.J. said, at p. 10: " In particular I would draw attention to the frequent references to the characteristic of continuance." G

Dealing with what seems also in this House to be one of the Crown's main points, the Lord Justice said, at p. 12:

" That the duties are statutory . . . cannot be denied. Nevertheless I for my part cannot regard these characteristics alone as sufficient to constitute the appointment an appointment to an ' office.' " H

He concluded:

" So each appointment was personal to the taxpayer; it lacked the

A characteristic of independent existence and continuance which, in my judgment, is one of the essential characteristics of an 'office.'"

Ackner L.J., at p. 13, reminds us of what Lord Wright said in *McMillan* v. *Guest* [1942] A.C. 561, 567, that the word "office" has to be construed in relation to the facts of the particular case

B "'according to the ordinary use of language and dictates of common sense with due regard to the requirement that there must be *some* degree'" (my emphasis) "'of permanence and publicity in the office.'"

(The reference to publicity was made because section 18 of the Finance Act 1922 did not apply.)

The learned Lord Justice also drew attention, at p. 13, to Lord Guthrie's C observation in the Inner House in *Inland Revenue Commissioners* v. *Brander & Cruickshank*, 46 T.C. 574, 584:

"'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, D or whether they merely did some work of a particular kind for the companies.'"

Lord Migdale's similar observation, at p. 587, is noted at pp. 14–15. It is also useful to meditate on the passages from *Davies* v. *Braithwaite* [1931] 2 K.B. 628, 633–634, 635–636 which Ackner L.J. quoted at pp. 16 and 17 and also the Lord Justice's gloss on these passages, at pp. 17–18:

E "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 F of State."

I respectfully associate myself with the learned Lord Justice's final paragraph, at p. 18A–C.

Oliver L.J. strikes a first blow for the respondent, at p. 19:

"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. G 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."

He also had criticisms to make, at p. 20C, of the Crown's heavy reliance on the public character of the duties.

H At p. 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 *Inland Revenue Commissioners* v. *Brander & Cruickshank* as reported in the House of

Lords [1971] 1 W.L.R. 212 and says, at p. 23: "So here, once again, emphasis is laid on the concept of continuance apart from the individual holder." A

I think I can fairly summarise the Court of Appeal's attitude by saying that all the judges recognised the changes since *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1 and accepted the principle in *Farrell* v. *Alexander* [1977] A.C. 59, but still considered that a degree of permanence and continuity was essential and were unwilling to disregard B a clear thread of supporting opinion which ran through a long line of cases.

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

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 D 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 Dictionary* definition, "a function or duty: a position imposing certain duties," etc. It must be obvious that the meaning of "function or duty," however it E 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* (1832), vol. 6, pp. 2–3 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* [1972] 1 W.L.R. 874. F

Paragraphs 12 and 13 of the appellant's case highlight the court's reliance in *Bater's* 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 (Finance Act, section 10) 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, G 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 Schedule 9, paragraph 2 to the Act of 1952: 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." H

The assumption in paragraph 17 of the case that the requirement of independent existence is derived from rule 1 in the Act of 1842 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 rule 1 and its successor, paragraph 2.

With regard to paragraph 17 (b), Lord Greene M.R. was in *McMillan* v. *Guest* [1941] 1 K.B. 258, 268 specifically referring to "the office of director."

Paragraph 17 (d) mentions *Dale* v. *Inland Revenue Commissioners* [1954] A.C. 11 where there was an office of trustee: Lord Normand's speech does not help the appellant.

With regard to paragraph 17 (e), I would point out that the quotation from *Inland Revenue Commissioners* v. *Brander & Cruickshank* (as reported in both Session Cases, 1970 S.C. 116, 121 and Tax Cases, 46 T.C. 574, 581) 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.

Paragraph 18, 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* [1975] A.C. 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 *Inland Revenue Commissioners* v. *Brander & Cruickshank*, 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* [1960] Ch. 498; [1962] A.C. 814 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 pecuniary and other terms; this is a neutral factor, but not according to paragraph 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.

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.

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 seised 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* view of permanence and continuity (*Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1). Nor do I omit to emphasise that an arbitrator under the Arbitration Act 1950 (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.

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* [1975] A.C. 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 pp. 205H—206A; neither do I forget what Lord Wilberforce said, at p. 215: "A director with a special assignment is none the less a director, . . ."

The respondent's case is not helped by reliance on section 204 of the Act of 1970 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* [1960] Ch. 145, 169:

> "The phrase 'locum tenens' is in fact a most apt and appropriate expression to describe the work. The 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* 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* test (*Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1): see Lord Evershed M.R. [1960] Ch. 498, 522. 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* [1923] 2 K.B. 447, 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 K.B. 128, 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] A.C. 15, 32 and adopted by Pearce L.J. in *Mitchell and Edon* v. *Ross* [1960] Ch. 498, 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* [1922] 2 A.C. 1, 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 [1920] 3 K.B. 266; [1922] 2 A.C. 1 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. A

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.

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 (section 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 (sections 108, 109). B C D

The taxpayer is a civil engineer. During the years of assessments in question (1973–74 and 1974–75) he was one of a panel of some 60 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 E

> "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." F

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. The Court of Appeal (Buckley, Ackner and Oliver L.JJ.) in turn allowed the taxpayer's appeal. From that decision the Crown now appeals to your Lordships' House. G

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 H

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. [1981] Ch. 1, 6, "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 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 section 5 of and paragraph 4 (2) of Schedule 1 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. 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 Rules of 1967, 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 Rules of 1967 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 W.L.R. 338, 344.

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 incumbent or his appointment to the post " [1981] Ch. 1, 6.

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 (section 146):

> "... 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 of 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.

In *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266 (Rowlatt J.); [1921] 2 K.B. 128 (Court of Appeal); [1922] 2 A.C. 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, section 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 pp. 273–274:

> "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 Schedule (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, quoting the important provisions of the first rule under Schedule (E.) in the Act of 1842, comments on them as follows [1922] 2 A.C. 1, 14–15:

> " 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 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, . . ." [1920] 3 K.B. 266, 274.

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* [1942] A.C. 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 *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1. 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* [1960] Ch. 498, 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 *Inland Revenue Commissioners* v. *Brander & Cruickshank* [1971] 1 W.L.R. 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 p. 215:

> "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. In *McMillan* v. *Guest* [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 K.B. 266, 274 (as adopted by Lord Atkinson [1922] 2 A.C. 1, 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.'"

It will thus be seen that all the relevant authorities hark back to *Great Western Railway Co.* v. *Bater* [1920] 3 K.B. 266; [1922] 2 A.C. 1. 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 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.

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 both 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.

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 section 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 section 204 (3) which provides:

> " 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 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."

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, for example, 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.

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 Act of 1971 are in a somewhat different

position. Their appointment is for a specific term: section 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 20) 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 section 204 of the Act of 1970.

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 section 24 of the Act of 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 rule 12 of Schedule 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.

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 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 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 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 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.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue; Lovell, White & King.*

M. G.

[HOUSE OF LORDS]

BUTTES GAS AND OIL CO. AND ANOTHER . . RESPONDENTS

AND

HAMMER AND ANOTHER . . . . . APPELLANTS

BUTTES GAS AND OIL CO. AND ANOTHER . . APPELLANTS

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HAMMER AND ANOTHER . . . . . RESPONDENTS

[CONJOINED APPEALS]

[On appeal from BUTTES GAS AND OIL CO. *v.* HAMMER; BUTTES GAS AND OIL CO. *v.* HAMMER (NO. 3)]

1981 June 22, 23, 24, 25, 29, 30; July 1, 2, 6, 7, 8, 9; Oct. 29

Lord Wilberforce, Lord Fraser of Tullybelton, Lord Russell of Killowen, Lord Keith of Kinkel and **Lord Bridge** of Harwich

Practice—Pleadings—Striking out—"Acts of state"—Foreign oil corporations' slander action over concessions in foreign territories granted by sovereign rulers — Particulars of defence including facts as to acts of sovereign states — Counterclaim for damages for alleged conspiracy to cheat and defraud by procuring acts of state — Whether established doctrine of English law of non-inquiry into acts of state — Whether pleaded defences and counterclaim to be struck out

Two Californian oil exploration corporations were granted oil concessions in the Persian Gulf. One was granted by the ruler of Umm al Qaiwain to corporation O ("the defendants") in November 1969 and the other to corporation B ("the