HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
11, 12 AND 19 DECEMBER 1974

COURT OF APPEAL—28, 29 AND 30 JULY
AND 3 OCTOBER 1975

HOUSE OF LORDS—4, 5 AND 27 OCTOBER 1976

Brumby (H.M. Inspector of Taxes) *v.* Milner[1]
Day (H.M. Inspector of Taxes) *v.* Quick[2]

Income tax, Schedule E—Company's profit-sharing scheme—Shares held on trust to distribute income among employees—Scheme wound up and trust fund distributed among employees—Whether distribution assessable.

In 1963 a public company with large family shareholdings, desiring to cut down those holdings without changing the effective shareholding control and also to provide an additional incentive to its employees, advanced £700,000 to trustees for the purpose of acquiring part of the family's shares and holding them upon trust to distribute the dividends among the employees (not being directors) of the company and its subsidiaries. The scheme was notified to employees by means of an explanatory booklet. It was a genuine profit-sharing scheme, which was intended (subject to the perpetuity rule) to continue indefinitely, and during its life the income was distributed equally among all employees over 21 with a minimum period of qualifying service. The company was, however, empowered by the trust deed to terminate the scheme on giving one year's notice to the trustees, in which event the net balance of the trust fund was to be distributed among the employees and pensioned ex-employees of the group in such proportions as the trustees should determine, or otherwise in equal shares. In consequence of a merger in 1969 with another group the company found it necessary to wind up the scheme, and in June 1971 the fund was distributed among qualifying employees and pensioners in sums depending partly on their length of service but not on the level of their remuneration. On appeal by two employees against assessment to income tax under Schedule E in amounts including the payments made in the distribution, the Special Commissioners held that the *causa causans* of the payments was the decision to wind up the scheme and that they were not emoluments of the recipients' employment.

In the High Court it was contended for the employees that the distribution was not an incentive but a windfall; alternatively that it was of a capital nature.

The Chancery Division held that (whether the question fell to be determined solely by reference to the terms of the trust deed or whether extraneous circumstances were also relevant), since the recipients of the distribution received it without any other qualification than that of being an employee at a particular date, it was an emolument arising from their employment, and that no such emolument could be a capital receipt.

The Court of Appeal held that the scheme was one scheme based fundamentally on reward for services by employees and the provision for terminal

(1) Reported (Ch.D.) [1975] 1 W.L.R. 958; [1975] 2 All E.R. 773; [1975] S.T.C. 215; 119 S.J. 257; (C.A.) [1976] 1 W.L.R. 29; [1975] 3 All E.R. 1004; [1975] S.T.C. 644; 119 S.J. 728; (H.L.) [1976] 1 W.L.R. 1096; [1976] 3 All E.R. 636; [1976] S.T.C. 534; 120 S.J. 754.

(2) Reported (Ch.D.) [1975] 1 W.L.R. 958; [1975] 2 All E.R. 773; [1975] S.T.C. 215; 119 S.J. 257; (C.A.) [1976] 1 W.L.R. 29; [1975] 3 All E.R. 1004; [1975] S.T.C. 644.

payments could not be regarded as not bearing any colour of reward for services, especially in the light of the discretion regarding allocation; the class of recipients included pensioned ex-employees who *ex hypothesi* would be such because of services rendered to the company and excluded any employees employed at the date of the determination of the scheme who in the period (up to a year) before distribution were dismissed for misconduct or incompetence, the deprival of entitlement being thus clearly referable to services.

The quality of the payments did not require to be determined solely by reference to the terms of the trust deed.

Held, in the House of Lords, that the payments arose from the employment and nothing else.

CASE

Stated under s. 56, Taxes Management Act 1970, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 24, 25, 26 and 27 September 1973, Samuel Milner (hereinafter called "Mr. Milner") appealed against the following assessment to income tax:

1971–72 Schedule E £1,118.

2. Shortly stated, the question for our decision was whether a sum received on the winding-up of a profit-sharing scheme was an emolument from his employment taxable under Schedule E.

3. The following witnesses gave evidence before us: Oliver Clucas Lace, M.I.Mech.E., J.P. ("Mr. Lace"), who at the material time was director of Wm. Park & Co. Forgemasters Ltd. ("Wm. Park") and chairman of that company from 1 October 1963 to February 1971; Sydney Leigh ("Mr. Leigh"), secretary of Wm. Park since 1966; Derek Michael Quick; Mr. Milner.

4. The following documents, which are available for inspection by the Court if required, were proved or admitted before us:

Bundle of minutes of Wm. Park 1963–64.

Bundle of minutes of Wm. Park 1969–71.

Bundle of minutes of trustees of Wm. Park's Employees Profit-sharing scheme (hereinafter called "the scheme").

Bundle of general documents.

Graphic representation of proposals for distribution of the balance of the funds of the scheme.

5. As a result of the evidence, both oral and documentary, adduced before us we find the following facts proved or admitted:

(1) Mr. Milner has been since May 1962 an employee of Gullick Dobson Ltd. (formerly Gullick Ltd.) a subsidiary of Wm. Park.

(2) At all material times Wm. Park was a public company with an issued share capital of 11,000,000 ordinary shares of 2*s.* each.

(3) For some time prior to September 1963 certain persons (hereinafter referred to collectively as "the Park family") who had large shareholdings in Wm. Park had been trying to dispose of a portion of their holdings with a view to minimising the problems which the incidence of estate duty would cause on

their deaths. They wished, however, to sell only to purchasers who would not wish to alter the character of Wm. Park and who would be acceptable to its board of directors. In 1963 negotiations took place for the sale of a block of shares to a finance house with the intention that the purchaser should hold them as an investment and take no part in the management of Wm. Park. By August 1963 these negotiations had broken down.

(4) At the same time as the Park family had been seeking to dispose of part of their shareholdings in Wm. Park, the directors of Wm. Park (in particular Mr. Lace and Mr. D. T. Walsh) had been trying to find ways of giving employees of Wm. Park and its subsidiary companies (hereinafter together called "the group") an incentive and a share of the group's profits. At the request of the directors Mr. N. Atty (then secretary and director of Wm. Park), with the object of achieving this aim as well as those of the Park family, drew up a memorandum of proposal dated 13 August 1963 for (*a*) the establishment of a trust (within the provisions of s. 54, Companies Act 1948) for the benefit of the employees of the group, and (*b*) a loan by Wm. Park to the trustees of the said trust of the amount required to purchase part of the Park family's holdings in Wm. Park. The scheme proposed in the said memorandum was considered and approved by the directors of Wm. Park at their board meeting on 4 September 1963.

(5) The said scheme was embodied in a deed dated 25 September 1963 (hereinafter called "the deed") entered into between Wm. Park and trustees, namely, Mr. Lace, Mr. Atty, Mr. Walsh and Mr. Wm. Fairclough, all four of whom were directors of Wm. Park. (The trustees for the time being of the deed are hereinafter called "the trustees".) Extracts from the deed are as follows:

> "Whereas . . . (C) The Company desires to institute a Scheme for the benefit of its employees or certain of them of the nature envisaged by S. 54(1)(b) of the Companies Act 1948 and for that purpose has now paid to the Present Trustees the sum of Seven hundred thousand pounds (in part provided by monies advanced by Williams Deacons Bank Limited) (hereinafter called 'the Bank') to be applied in manner hereinafter appearing and it is desired to record (without intending by this recital to create any trust or to use the word 'employees' in any particular sense) that in relation to such Scheme and this Deed the primary object is that Ordinary Shares in the Company acquired for the purposes of this Deed shall provide income (normally by means of receipt of dividends from such shares) for division between employees . . ..
>
> Now This Deed Witnesseth And It Is Hereby Agreed As Follows:
>
> 1. In this Deed where the context admits . . . 'Employee' means a person of either sex (other than a director of the Company but including a director of any subsidiary company of the Company who is not a director of the Company) who is in the full time employment of the Company and has attained twenty one years of age and includes an apprentice (who has attained twenty one years of age) Provided Further that for the purpose of this present definition i.e. of the word 'Employee' the expression 'the Company' includes [certain companies, one of which was Gullick Limited] and any other company for the time being a subsidiary of the Company. 'The Debt' means the said sum of Seven hundred thousand pounds and such further sums as may from time to time be advanced to the Trustees by the Company for the purposes of this Deed or such of the same as shall for the time being not have been repaid. 'Trust Fund' means the monies

from time to time received from the Company by the Trustees by way of Advances as aforesaid and the investments and monies for the time being representing the same or such of the same as shall not for the time being have been applied by the Trustees for the purposes of this Deed and in particular for repayment of the Debt.

2. The Company and the Trustees Agree as follows: (1) The Debt shall not carry interest unless and until either the Company's Auditors shall have certified to the Trustees that the Company's financial position is such that the Auditors cannot any longer recommend that the Debt should continue interest-free or the Scheme terminates under Clause 7 hereof . . . (2) The Company shall not demand repayment of the Debt or any part thereof unless and until either the Company's Auditors shall certify to the Trustees that the Company's financial position is such that the whole or such part of the Debt as is specified in such certificate ought to be paid to the Company forthwith or the Scheme terminates under clause 7 hereof.

3. (1) For the purposes of the discharge of the Debt or any part thereof or any interest payable thereon the Trustees may at such time or times and for such period or periods as they think fit accumulate the whole or any part of the income of the Trust Fund. (2) For the purposes of the discharge of the Debt or the acquisition of Ordinary Shares in the Company the Trustees may—(a) dispose of or mortgage or charge any part or parts of the Trust Fund including Ordinary Shares in the Company (b) take advantage of a rights issue made by the Company in respect of or offering Ordinary Shares in the Company and for the purpose of taking such advantage may exercise the aforesaid powers of disposition and dealing (c) sell all or any rights under any such rights issue as aforesaid (d) invest monies comprised in the Trust Fund and not for the time being required for or not (in the Trustees' discretion) conveniently applicable to the acquisition of Ordinary Shares in the Company or the discharge of the Debt with all the powers and choice of investment of an individual investing his own money . . .

5. The Trustees shall hold the dividends from Ordinary Shares in the Company or other the income of the Trust Fund received by them in trust (subject to their discretion under clause 3(1) hereof) to divide the same between the Employees at the time of such receipt in each case in such proportions (exclusive of one or more of the Employees) as the Trustees shall think fit to determine within one calendar month of such receipt in each case and failing such determination between the Employees at the time of such receipt in each case equally . . .

7. The Scheme shall forthwith determine (a) at the expiration of one year after the date upon which the Company shall have given notice in writing to the Trustees of its intention to determine the same or (b) if an order is made or an effective resolution passed to wind up the Company or (c) at the expiration of twenty years from the day of the death of the last survivor of the lineal descendants now living of his late Majesty King George V.

8. On the determination of the Scheme the Trustees shall as soon as practicable realise the Trust Fund and shall apply the net proceeds of such realisation and any undisposed of income of the Trust Fund as follows: (a) in paying to the Company the amount of the Debt or such part of the same as shall then be owing and subject thereto . . . (c) in distributing the

balance if among the Employees and former employees in receipt of pensions from any Funds or Schemes under which they shall be entitled by virtue of having been an employee respectively as at the date of the determination of the Scheme (other than Employees (if any) who shall after such date and prior to such distribution have been dismissed for misconduct or incompetence) in such proportions as the Trustees shall within the year next following the date of the determination of the Scheme by writing determine and in default of such determination between the said Employees and former employees ascertained as at the said date of determination in equal shares.

9. The power of appointing new Trustees shall be exercised by the Company . . .

13. The Company may at any time and from time to time modify vary or abrogate any of the provisions of this Deed with the consent of the Trustees and the approval of a majority of the Employees present at a meeting thereof convened for the purpose."

(6) We accept the evidence given to us that the scheme embodied in the deed was a genuine profit-sharing scheme which, although determinable by Wm. Park on one year's notice, was at its inception intended by all concerned to continue indefinitely (subject to the provision in the deed designed to keep the trust within the perpetuity rule).

(7) Shortly after the execution of the deed Mr. Leigh was appointed secretary of the trustees and he became responsible for the conduct and day to day administration of the scheme and acted in that capacity during the entire life of the scheme.

(8) The scheme was duly set up with the initial purchase of some 2,000,000 shares in Wm. Park at a cost of about £730,000.

(9) Participation in the scheme was not the subject of any agreement with the employees of the group. All the employees of the group at the time when the scheme was set up were told of it by a notice dated 26 September 1963. This notice referred to a proposal to publish the precise "rules of the trust" but, as we understand it, no such formal rules were ever prescribed. In August 1965 an explanatory booklet describing the scheme and how it was intended to be managed was issued to every employee of the group. Thereafter the explanatory booklet was issued to employees of companies newly becoming subsidiaries of Wm. Park but no steps were taken to tell other individuals newly taking up employment with the group. We infer that such employees would have first learned of the scheme from their colleagues or from notice boards, perhaps at the time of the annual distribution of profits by the trustees.

(10) The said explanatory booklet contained *inter alia* the following paragraphs:

"*Distribution of Income Among Employees*

1. Within one calendar month of the receipt of any income by them from the Scheme the Trustees shall decide the amount of such income which shall be used in repaying the loan and how much shall be retained and reinvested and shall within one calendar month thereafter divide the remainder amongst all persons employed on that date by [Wm. Park] or

by any of its wholly owned Subsidiary Companies who have qualified to receive the same as hereinafter mentioned.

2. An Employee entitled to share in a distribution of income is a person of either sex living at the date of payment who is not a Director of [Wm. Park] and who conforms with all the following conditions that is to say (i) has attained twenty-one years of age before the date of commencement of the financial year of [Wm. Park] ending next prior to the receipt by him or her of his or her share in any distribution of income and (ii) throughout such financial year of [Wm. Park] as aforesaid has been continuously in its employment or in the employment of any one or more of its wholly owned Subsidiary Company or Companies including any such Subsidiary Company as shall have been acquired by [Wm. Park] after the commencement of such financial year and (iii) has been in such employment continuously during the twelve months preceding the commencement of such financial year of [Wm. Park] as aforesaid. Provided that for the purposes only of Sub Clause (ii) Continuous Employment during such financial year as there mentioned shall not be deemed to have been interrupted by sickness or accident or by termination of employment during such year if upon such termination the Employee shall thereby be entitled to a pension from his employing company. This means that a retiring employee shall be entitled to participate in the first distribution which takes place after the expiry of the financial year of the Company during which he retires but not in any subsequent distribution. . . .

Additional Notes for Guidance of Employees

Apart from income have I any rights under the scheme? Yes. Subject to repayment of the original loan etc., the shares are held in Trust for employees and in the unlikely event of the scheme being terminated you may be eligible for a Share in the residue. This is a complicated matter, however, and is set out in some detail in the relevant Trust Deed."

(11) During the life of the scheme the trustees applied the trust income in the manner described in the explanatory booklet, except that there was a minor modification in the period of qualifying service in the case of a special distribution in June 1969 made out of an interim dividend in Wm. Park. Over the seven fiscal years 1963–64 to 1969–70 inclusive the number of employees who were qualified to share in the distribution increased from about 800 to rather more than 1,600 and the net amount of the annual distribution, after deduction of tax, to each employee ranged from about £9 to £14. There was no link between the amount of the distribution and the amount of an employee's ordinary remuneration. A further distribution of £5 net after deduction of tax was made in October 1970 to each employee who qualified.

(12) In 1969 Wm. Park merged with another company, Dobson Hardwick Ltd. (hereinafter called "Dobson"), both companies becoming subsidiaries of a holding company, Dobson Park Industries Ltd. Consideration was given to extending the scheme to the enlarged group of companies or alternatively to continuing it for the group alone but the difficulties of either course were felt to be too great. Accordingly the trustees resolved at their meeting on 19 January 1970:

"That in view of the difficulties of administering the [scheme], due to the structure of the new Group, it was considered that the Scheme should be determined, and that the Board of [Wm. Park] be requested to indicate the future direction of the Scheme."

A The board of Wm. Park, meeting on the same day, immediately after the trustees' meeting resolved with great reluctance:

> "That the [scheme] be determined at the expiration of one year from this date 19 January 1970, and that the Secretary be instructed to give notice in writing to the Trustees accordingly, and that they then proceed with the realisation of the Fund and the application of the proceeds in
B accordance with the [deed]."

(13) We find as a fact that in terminating the scheme the board of Wm. Park were primarily actuated by factors arising from the merger of Wm. Park and Dobson and that the distribution of the balance of the trust funds to employees was not an object of their decision but only an incidental consequence.

C (14) Following the decision to terminate the scheme the trustees resolved, in order to give time for the sale of the shares held in trust and for consideration of the distribution of the balance remaining after repayment of the loan from Wm. Park, to delay notifying employees of the termination. At some date before 22 March 1971 all the said shares had been realised but no final decision had been reached as to the distribution of the balance of the trust funds. On
D 22 March 1971 notices telling employees of the termination of the scheme were displayed on the group's notice boards. These notices included the following paragraph:

> "Under the terms of the Trust the assets of the Fund are to be applied first in clearing the loan and certain expenses and then the balance is for distribution among certain employees and certain former employees in
E receipt of Company pensions. The Trust lays down specific provisions subject to which the distribution is to be decided by the Trustees and their decision is final. Employees and former employees who share will therefore be notified individually."

(15) In June 1971 the balance of the trust funds of the scheme available for distribution in accordance with clause 8(c) of the deed was about £370,000.
F At successive meetings (in particular, at those held on 6 January, 6 April and 27 May 1971 respectively) the trustees considered how their discretion as regards the distribution should be exercised and they recognised that employees' length of service should be recognised to some extent. Eventually they adopted a formula by which the distribution was to be among full-time employees and pensioners. Beneficiaries were required to be 21 years of age not later than
G 19 January 1971, which date was also adopted for the purpose of assessing years of service. The effect of this formula was to fix a standard award of £X for four years' qualifying service, with an additional 20 per cent. of standard for five years' qualifying service and for every further complete five years of qualifying service up to a maximum of 25 years' total qualifying service, and with a reduction of 20 per cent. of standard for every complete year of qualifying
H service less than four years—a minimum of one year's qualifying service being required for any award. On this basis the standard award was calculated at £167.10. The amounts awarded were thus solely related to length of service and not related in any way to the level of the recipients' remuneration. Former employees not being in receipt of a pension from the group (for example, those who might have moved to another company within the Dobson Park Industries
I group not covered by the scheme) received no award: indeed the trustees had no power under the deed to make them an award.

(16) In pursuance of this decision, the trustees on 21 June 1971 signed a memorandum by which they determined that the income and capital of the trust fund shown as distributable in accounts thereof made up to 23 June 1971 should be paid to the persons and in the amounts respectively shown in a schedule to the said memorandum. A

(17) Mr. Milner, whose qualifying service was between five and ten years, was thus awarded £200.52, that is to say, the standard award plus 20 per cent. B

(18) A difference of opinion with the Inland Revenue having arisen as regards the liability to income tax of the sums so distributable to employees, the trustees resolved on 27 May 1971 that an interim distribution of 50 per cent., to the nearest £, should be made—the balance of the trust fund being retained pending settlement of the tax question. This interim distribution was made on 23 June 1971, the payment to Mr. Milner being £100. C

(19) The said £100 was included in the assessment against which Mr. Milner appealed.

6. It was contended on behalf of Mr. Milner:

(i) that on determination of the scheme the trustees were obliged to distribute the balance of the trust funds between individuals eligible under clause 8(c) of the deed in such shares as the trustees in the proper exercise of their discretion should determine; D

(ii) that such distribution was not made in order to reward the employees but because the merger of Wm. Park with Dobson had made the continuation of the scheme impracticable;

(iii) that the fact that the trustees in the exercise of their discretion fixed the amounts of the payments to each employee by reference to length of service cannot by itself convert the payments into a reward for services; E

(iv) that the decisive reason for the payments was not the recipients' employment but was the merger between Wm. Park and Dobson;

(v) that the payments were not received by the employees "from" their employment in any real sense of the word but were received as an incident of the said merger, and F

(vi) that the payment received by Mr. Milner, which is the subject-matter of this appeal, was not liable to income tax under Schedule E.

7. It was contended on behalf of H.M. Inspector of Taxes:

(i) that as regards the question of liability to income tax under Schedule E of the said payment to Mr. Milner it was irrelevant: (*a*) that the payment was made by a third party and not by his employer, (*b*) whether or not Mr. Milner knew of the scheme, (*c*) what was the motive of the trustees and (*d*) whether the payment was capital or income in the hands of the trustees; G

(ii) that the crucial question was what was the character of the payment in the hands of Mr. Milner;

(iii) that Mr. Milner had received the payment as a reward for past services rendered to his employer, and H

(iv) that accordingly the payment was liable to income tax under Schedule E.

8. The following authorities were cited to us: *Edwards* v. *Roberts* (1935) 19 T.C. 618; *Calvert* v. *Wainwright* 27 T.C. 475; [1947] K.B. 526; *Dale* v. *Commissioners of Inland Revenue* 34 T.C. 468; [1954] A.C. 11; *Bridges* v. *Bearsley* 37 T.C. 289; [1957] 1 W.L.R. 674; *Hochstrasser* v. *Mayes* 38 T.C. 673; I

[1960] A.C. 376; *White* v. *Franklin* 42 T.C. 283; [1965] 1 W.L.R. 492; *Laidler* v. *Perry* 42 T.C. 351; [1966] A.C. 16.

9. We, the Commissioners who heard the appeal, gave our decision orally as follows:

The statutory provisions relevant to this appeal are ss. 181(1) and 183(1), Income and Corporation Taxes Act 1970. Accordingly, the test that we have to apply is whether these payments were emoluments (a term which includes "all . . . perquisites and profits whatsoever") from Mr. Milner's employment. It is clear from the authorities that were cited to us that this question must be answered in the light of the particular facts of the case. It is also clear that not every payment made to an employee (even if he would not have received the payment at all but for his status as employee) necessarily arises "from" his employment.

As we understand it, the test to be applied is whether the employment was the *causa causans* and not merely the *causa sine qua non* of the payment in question. We do not find this an easy question in the present case. In our view, however, once the decision was taken to wind up the scheme, it was inevitable that the balance of the trust funds should be distributed amongst employees and pensioners either in such proportions as the trustees should determine or in default of such determination equally amongst them. If the trustees had failed to exercise their discretion, so that in default the beneficiaries specified in clause 8(c) of the deed had become entitled to the trust funds equally, we should have found that the decision to wind up the scheme following the merger of Wm. Park with Dobson Hardwick Ltd. was the *causa causans* of the payments and that the beneficiaries' employment was merely the *causa sine qua non*. We considered, however, whether the trustees' decision to take length of service into account in fixing the amounts of the payments made the employment the *causa causans*. We do not think that it did. As we see it, the exercise of the trustees' discretion was no more more than an act of quantification of the amounts distributable to individual beneficiaries under the said clause 8(c) and not an act of rewarding employees for their service. We hold that the *causa causans* of the payments was the decision to wind up the scheme and that accordingly the payment to Mr. Milner was not a payment of emoluments from his employment. The appeal succeeds and we reduce the assessment accordingly.

10. The Inspector of Taxes immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and on 22 October 1973 required us to state a Case for the opinion of the High Court pursuant to s. 56, Taxes Management Act 1970, which Case we have stated and do sign accordingly. The question of law for the opinion of the Court is whether on the facts found by us our decision was correct.

J. G. Lewis
Basil James
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
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20 May 1974

The cases came before Walton J. in the Chancery Division on 11 and 12 December 1974, when judgment was reserved. On 19 December 1974 judgment was given in favour of the Crown, with costs.

Peter Rees Q.C. and *Brian Davenport* for the Crown.

M. C. Nourse Q.C. and *Joseph Turner* for the taxpayers.

The following cases were cited in argument in addition to those referred to in the judgment:—*Cooper* v. *Blakiston* 5 T.C. 347; [1909] A.C. 104; *Simpson* v. *John Reynolds & Co. (Insurances) Ltd.* 49 T.C. 693; [1974] 1 W.L.R. 1411; *Chibbett* v. *Joseph Robinson & Sons* (1924) 9 T.C. 48.

Walton J.—These two appeals both arise out of the same set of facts, which are of the simplest. In the year 1963 some of the shareholders in a company called William Park & Co. Forgemasters Ltd. ("the company") wished to dispose of, or to reduce, their holdings of shares in the company, but at the same time they did not wish to dispose of their shares to purchasers who would be likely to attempt to alter the character of the company. Simultaneously, the directors of the company had been trying to find ways to give employees of the company and its subsidiaries an incentive by means of some kind of profit-sharing scheme. It was realised that both of the two objectives could be very simply met by means of a scheme under s. 54(1)(*b*) of the Companies Act 1948. Briefly, the company would lend a sum of money to the trustees of a trust deed established for the purposes of a scheme to enable those trustees to purchase shares in the company, which they would purchase from the shareholders wishing to dispose of the same, and the trustees would thereafter hold the shares upon trust for the benefit of employees of the company.

A scheme along these lines was considered and approved by the directors of the company at a board meeting on 4 September 1963, and a suitable trust deed was then entered into on 25 September 1963. So far as relevant, it is in these terms: "This Deed is made the 25th day of September, 1963, between William Park & Co. Forgemasters Limited . . . of the one part" and various trustees, called "the Present Trustees", of the other part. "Whereas", and then the incorporation of the company is recited, the authorised capital of the company is recited, and:

> "(C) The Company desires to institute a Scheme for the benefit of its employees or certain of them of the nature envisaged by Section 54(1)(b) of the Companies Act 1948 and for that purpose has now paid to the Present Trustees the sum of Seven hundred thousand pounds (in part provided by monies advanced by Williams Deacons Bank Limited) (hereinafter called 'the Bank') to be applied in manner hereinafter appearing and it is desired to record (without intending by this recital to create any trust or to use the word 'employees' in any particular sense) that in relation to such Scheme and this Deed the primary object is that Ordinary Shares in the Company acquired for the purposes of this Deed shall provide income (normally by means of receipt of dividends from such shares) for division between employees".

Then the deed itself witnessed, and it was provided, as follows. There was first of all a definition clause, which I do not think I need read in full save that an "employee" was defined as meaning

> "a person of either sex (other than a director of the Company but including a director of any subsidiary company of the Company who is not

A a director of the Company) who is in the full time employment of the Company and has attained twenty one years of age and includes an apprentice (who has attained twenty one years of age) Provided Further that for the purpose of this present definition i.e. of the word 'Employee' the expression 'the Company' includes Parks Forge Limited English Tools Limited A. & F. Parkes Limited A. Morris & Sons (Dunsford) B Limited Gullick Limited Herbert Cotterill Limited Hope Hydraulics Limited Thomas Gaskell & Co. Limited Scotts (St. Helens) Limited and any other company for the time being a subsidiary of the Company".

Clause 2:

"The Company and the Trustees Agree as follows: (1) the Debt"—that is, the money owed by the trustees to the company—"shall not C carry interest unless and until either the Company's Auditors shall have certified to the Trustees that the Company's financial position is such that the Auditors cannot any longer recommend that the Debt should continue interest-free or the Scheme terminates under Clause 7 hereof". Then there is a proviso as to interest, which I need not read. "(2) The Company shall not demand repayment of the Debt or any part thereof D unless and until either the Company's Auditors shall certify to the Trustees that the Company's financial position is such that the whole or such part of the Debt as is specified in such certificate ought to be paid to the Company forthwith or the Scheme terminates under clause 7 hereof."

Clause 3:

"(1) For the purposes of the discharge of the Debt or any part thereof E or any interest payable thereon the Trustees may at such time or times and for such period or periods as they think fit accumulate the whole or any part of the income of the Trust Fund (2) For the purposes of the discharge of the Debt or the acquisition of Ordinary Shares in the Company the Trustees may (a) dispose of or mortgage or charge any part or parts of the Trust Fund including Ordinary Shares in the Company (b) take F advantage of a rights issue made by the Company in respect of or offering Ordinary Shares in the Company and for the purpose of taking such advantage may exercise the aforesaid powers of disposition and dealing (c) sell all or any rights under any such rights issue as aforesaid (d) invest monies comprised in the Trust Fund and not for the time being required for or not (in the Trustees' discretion) conveniently applicable to the G acquisition of Ordinary Shares in the Company or the discharge of the Debt with all the powers and choice of investment of an individual investing his own money."

Clause 5:

"The Trustees shall hold the dividends from Ordinary Shares in the Company or other the income of the Trust Fund received by them in H trust (subject to their discretion under clause 3(1) hereof) to divide the same between the Employees at the time of such receipt in each case in such proportions (exclusive of one or more of the Employees) as the Trustees shall think fit to determine within one calendar month of such receipt in each case and failing such determination between the Employees at the time of such receipt in each case equally Provided Further that the I Trustees may with the consent of the Company at any time within six

months from the date of this Deed make Rules in writing for or dealing with (in such manner as the Trustees think fit) the apportionment of the divisible income of the Trust Fund (up to the time when this Scheme terminates) between the Employees and such Rules when made shall thereupon take effect in substitution for the foregoing provisions of this clause and such substituted provisions shall accordingly be subject to the power contained in clause 13 of this Deed."

Clause 7:

"The Scheme shall forthwith determine (a) at the expiration of one year after the date upon which the Company shall have given notice in writing to the Trustees of its intention to determine the same or (b) if an order is made or an effective resolution passed to wind up the Company or (c) at the expiration of twenty years from the day of the death of the last survivor of the lineal descendants now living of his late Majesty King George V."

Clause 8:

"On the determination of the Scheme the Trustees shall as soon as practicable realise the Trust Fund and shall apply the net proceeds of such realisation and any undisposed of income of the Trust Fund as follows: (a) in paying to the Company the amount of the Debt or such part of the same as shall then be owing and subject thereto (b) in repaying to the Company all sums paid by the Company pursuant to clause 4 of this Deed and subject thereto (c) in distributing the balance if any among the Employees and former employees in receipt of pensions from any Funds or Schemes under which they shall be entitled by virtue of having been an employee respectively as at the date of the determination of the Scheme (other than Employees (if any) who shall after such date and prior to such distribution have been dismissed for misconduct or incompetence) in such proportions as the Trustees shall within the year next following the date of the determination of the Scheme by writing determine and in default of such determination between the said Employees and former employees ascertained as at the said date of determination in equal shares."

The trustees do not appear to have exercised the power to make rules given to them by the trust deed, but they did cause to be circulated an explanatory booklet entitled "Wm. Park & Co. Forgemasters Limited and Subsidiary Companies—Profit Sharing Scheme". The very first paragraph of that document, which is in the form of a letter from the then chairman of the company to all employees, reads as follows:

"The Directors of" the company "had for many years been desirous of instituting a scheme whereby employees of the Group of which it forms the head had an interest in the shares of this Company and a means of sharing in the profits of the Group."

There can, I think, be no doubt that this paragraph accurately represents the intention of the company in entering into the scheme, and the thinking which lay behind it is equally accurately summarised in the last paragraph of that letter:

"I consider this to be one of the most important steps taken in the history of the Company. The success of the Scheme, and the amount available annually for distribution to the employees, depends upon the profits the Company is able to make. This in turn depends largely on the

A skill, loyalty and hard work of each and every employee of the Group. The Directors formulated the Scheme and by instituting it took upon themselves considerable additional responsibilities entirely for the benefit of employees, but they look with confidence to the co-operation of everyone to make the Scheme a great success."

I think the only other part of that booklet to which I need refer is the very B last provision of all, under the heading, "Additional Notes For Guidance Of Employees", which reads as follows:

> "Apart from income have I any rights under the scheme? Yes. Subject to repayment of the original loan etc., the shares are held in Trust for employees and in the unlikely event of the scheme being terminated you may be eligible for a Share in the residue. This is a complicated matter, C however, and is set out in some detail in the relevant Trust Deed."

It is quite clear from this, as Mr. Nourse, for the taxpayers, submitted, that the prospect of obtaining what is there called "a share in the residue" was hardly placed in a prominent position among the attractions of the scheme as presented to the employees.

There is no doubt that the scheme was intended to be a genuine profit- D sharing scheme, which, although determinable by the company as in the trust deed provided, was at its inception intended by all concerned to continue indefinitely, save only that its duration was bounded by the perpetuity period. It was duly implemented shortly after the execution of the deed by means of a loan to the trustees from the company, with which they purchased the shares which the various shareholders wished to dispose of. Nothing turns in any way E on the details of such loan or purchases, or otherwise upon the detailed administration of the scheme. However, in the year 1969 the company merged with another company altogether, Dobson Hardwick Ltd., the merger taking the form of the incorporation of a holding company, Dobson Park Industries Ltd., of which company both of the others became subsidiaries. Consideration was given to the extension of the scheme to the new group of companies or to the F continuation of the scheme for the group of which the company was the parent company alone, but the difficulties of either course were, quite genuinely, felt to be far too great. Accordingly, the trustees of the scheme, at a meeting on 19 January 1970, resolved to request the company to (in effect) wind up the scheme, which, by a resolution of the board of the company made on the same day, the company duly did, pursuant to its powers under clause 7(a) thereof, G thus bringing the scheme to an end one year later; namely, on 18 January 1971. There is no doubt but that this was a genuine decision, reluctantly forced upon the company by hard commercial realities, and there was no other reason for their actions.

I can now conveniently refer directly to the findings of the Special Commissioners. In the Case Stated in relation to Mr. Milner's appeal they say, in H para. 5(15) *et seq*:

> "In June 1971 the balance of the trust funds of the scheme available for distribution in accordance with clause 8(c) of the deed was about £370,000. At successive meetings"—and they are then particularised—"the trustees considered how their discretion as regards the distribution should be exercised and they recognised that employees' length of service I should be recognised to some extent. Eventually they adopted a formula

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by which the distribution was to be among full-time employees and pensioners. Beneficiaries were required to be 21 years of age not later than 19 January 1971, which date was also adopted for the purpose of assessing years of service. The effect of this formula was to fix a standard award of £X for four years' qualifying service, with an additional 20 per cent. of standard for five years' qualifying service and for every further complete five years of qualifying service up to a maximum of 25 years' total qualifying service, and with a reduction of 20 per cent. of standard for every complete year of qualifying service less than four years—a minimum of one year's qualifying service being required for any award. On this basis the standard award was calculated at £167.10. The amounts awarded were thus solely related to length of service and not related in any way to the level of the recipients' remuneration . . . (16) In pursuance of this decision, the trustees on 21 June 1971 signed a memorandum by which they determined that the income and capital of the trust fund shown as distributable in accounts thereof made up to 23 June 1971 should be paid to the persons and in the amounts respectively shown in a schedule to the said memorandum. (17) Mr. Milner, whose qualifying service was between five and ten years, was thus awarded £200.52, that is to say, the standard award plus 20 per cent."

The same amount was awarded to Mr. Quick, whose period of qualifying service was precisely the same. The only distinction between his case and that of Mr. Milner is that he is a more highly remunerated employee than Mr. Milner, but nothing turns on this circumstance.

The trustees endeavoured to obtain clearance from the Revenue to enable them to distribute all the sums which they had determined to distribute without fear of any untoward tax consequences. The Revenue declined to give such a clearance, so that ultimately the trustees were obliged to distribute only part of the sums so earmarked for them to each beneficiary. This interim distribution was made on 23 June 1971, both Mr. Milner and Mr. Quick receiving the sum of £100. Thereupon the Revenue made assessments on both of them in respect of the year 1971–72 in sums which included in each case this £100. From these assessments both Mr. Milner and Mr. Quick appealed to the Special Commissioners, and they, by their decisions, found in each case in favour of the taxpayer and reduced each assessment by £100 accordingly. From these two decisions the Crown has appealed to this Court. It is obvious that these cases are, in effect, test cases, because there is no conceivable method of discriminating between the employees: either all are taxable in respect of the amounts received by them on the winding-up of the scheme, or none.

The relevant statutory provisions are extremely short, and are to be found in the Income and Corporation Taxes Act 1970, ss. 181(1) and 183(1). Section 181(1) reads as follows:

"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"—and I need read only Case I. "Case I: where the person holding the office or employment is resident and ordinarily resident in the United Kingdom, and does not perform the duties of the office or employment wholly outside the United Kingdom in the chargeable period (and the emoluments are not excepted as foreign emoluments), any emoluments for the chargeable period".

A Section 183(1):

> "Tax under Case I . . . of Schedule E shall, except as hereinafter mentioned, be chargeable on the full amount of the emoluments falling under that Case, subject to such deductions only as may be authorised by the Tax Acts, and the expression 'emoluments' shall include all salaries, fees, wages, perquisites and profits whatsoever."

B The crucial question is at once seen to lie within an extremely small legal compass. Did the terminal payments so received by Mr. Milner and Mr. Quick arise "therefrom"—that is to say, from their office or employment with the company?

The reasons given by the Special Commissioners for answering that question in the negative are as follows:

C

> "Accordingly, the test that we have to apply is whether these payments were emoluments (a term which includes 'all . . . perquisites and profits whatsoever') from Mr. Milner's employment. It is clear from the authorities that were cited to us that this question must be answered in the light of the particular facts of the case. It is also clear that not every payment made to an employee (even if he would not have received the payment at all
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> D but for his status as employee) necessarily arises 'from' his employment. As we understand it, the test to be applied is whether the employment was the *causa causans* and not merely the *causa sine qua non* of the payment in question. We do not find this an easy question in the present case. In our view, however, once the decision was taken to wind up the scheme, it was inevitable that the balance of the trust funds should be distributed amongst
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> E employees and pensioners either in such proportions as the trustees should determine or in default of such determination equally amongst them. If the trustees had failed to exercise their discretion, so that in default the beneficiaries specified in clause 8(c) of the deed had become entitled to the trust funds equally, we should have found that the decision to wind up the scheme following the merger of Wm. Park with Dobson Hardwick Ltd.
>
> F was the *causa causans* of the payments and that the beneficiaries' employment was merely the *causa sine qua non*. We considered, however, whether the trustees' decision to take length of service into account in fixing the amounts of the payments made the employment the *causa causans*. We do not think that it did. As we see it, the exercise of the trustees' discretion was no more than an act of quantification of the amounts distributable to individual
>
> G beneficiaries under the said clause 8(c) and not an act of rewarding employees for their service. We hold that the *causa causans* of the payments was the decision to wind up the scheme and that accordingly the payment to Mr. Milner was not a payment of emoluments from his employment."

Now all Counsel in this case—Mr. Peter Rees and Mr. Davenport, on behalf of the
H taxpayers—have stressed to me that in answering the short question which I have posed above it is necessary to take into account all the circumstances of the case, and in those circumstances they have all included the motives and reasons actuating the company in setting up and otherwise establishing the trust fund, and also in finally bringing it to an end; and, at any rate so far as Mr. Nourse and his Junior are concerned, they have also sought to include in
I all the circumstances of the case the expectation (or, rather, of course, the lack of expectation) of the present employees ever obtaining anything out of the capital of the trust fund. On reflection, however, I am extremely dubious as

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to how far I am really entitled to take any of these circumstances into account at all. It appears to me that the situation here is that all payments made to the employees under the scheme, both whilst it was running and now proposed to be made on its termination, are made—indeed, can only be made—pursuant to the terms of the trust deed, whose material provisions I have already read. That trust deed needs no special interpretation: its terms and objects are manifest on its face. In those circumstances, can I properly receive evidence outside its four walls? In *Patrick* v. *Burrows* (1954) 35 T.C. 138 Wynn-Parry J., speaking of transfers of shares effected under and pursuant to the terms of a trust deed to various employees, said this (at page 142):

> "Now, in my judgment, the whole question which the Commissioners had to consider was a question essentially of law, because the whole case turns upon the true construction of the trust deed in question. No evidence outside the contents of the trust deed was led, or could be led. The whole case turns upon the true inference to be drawn from the language of the deed."

I have not invited Counsel to make submissions upon this aspect of the matter to me, because it appears to me clear that however the matter is approached, whether from the point of view of the construction of the trust deed alone or from the widest possible aspect taking all the circumstances of the matter into account, the result must be the same. I would, however, refer once more to the case which I have just cited with a view to providing a short answer to a point which was made to me by Mr. Joseph Turner. He submitted that payments made under clause 8 of the deed would be payments of a capital nature, and that the Court ought not to be asked to find that it should be treated as income. In *Patrick* v. *Burrows* the trust deed directed payment of all income arising from the trust fund to the settlor, and provided for the transfer of the shares which were the settled capital producing the income to employees of the company, selected by the directors, to whom it was expedient to give an interest in the business in consideration of past or future services and with a view to the prosperity of the company. The value of the shares so transferred, though most plainly capital in the hands of the trustees, was nevertheless held to be income in the hands of the recipients. In truth, under Schedule E there is no such thing as an emolument in the form of a capital receipt. Had there been, it would have provided the shortest possible of all answers in the leading case of *Hochstrasser* v. *Mayes*[1], which it is convenient to cite from 38 T.C. 673, since this report collects the judgments in all three Courts together.

It is from this case that the test of "*causa causans*" as opposed to "*causa sine qua non*" arises: it originates in the judgment of Jenkins L.J. in the Court of Appeal. I shall first of all read the headnote of that case in order that the points made therein should become intelligible. The headnote reads:

> "A company operated a housing scheme for married employees whom it transferred from one part of the country to another. Under the scheme an employee might be offered a loan to assist in the purchase of a house and, provided the house was maintained in good repair, payment of the amount of the loss due to depreciation in its value in certain events, including, subject to an option to the company to buy the house at a valuation, its sale for less than the original purchase price in consequence of the employee's being transferred. M and J entered into agreements under the scheme, of which they had not known when they joined the

(1) [1959] Ch. 22; [1960] A.C. 376.

company. Having sold their houses at a loss on transfer they received payments from the company, and were assessed thereon to Income Tax under Schedule E for the years 1954–55 and 1953–54 respectively. On appeal it was contended for the Crown that the payments were profits from an employment, or alternatively, in J's case, chargeable by virtue of Section 160, Income Tax Act, 1952. The General Commissioners held in M's case that the payment was not assessable; other General Commissioners held in J's case that the payment was a profit from his employment. *Held*, (1) in the House of Lords in M's case and in the Court of Appeal in J's case, that the payments were not profits accruing by virtue of an office or employment."

Then there is a further point with which we are not concerned, so I shall not read further from the headnote.

Now I think that the facts of that case quite clearly established that it is by no means every payment made by an employer to an employee—and, of course, *a fortiori* by no means every payment made by a third party to an employee of the employer—which necessarily forms part of his emoluments. It may well not arise "therefrom"; that is to say, as interpreted by the cases, solely from the relationship of employee of that employer. It is, I think, in this sense that Jenkins L.J. introduced the test of *causa causans* in these words(1):

> "I think it may well be said here that, while the employee's employment by I.C.I. was a *causa sine qua non* of his entering into the housing agreement and consequently, in the events which happened, receiving a payment from I.C.I., the *causa causans* was the distinct contractual relationship subsisting between I.C.I. and the employee under the housing agreement, coupled of course with the event of the house declining in value."

This test was repeated by Lord Simonds in the House of Lords, and the actual passage I have cited was also approved by Lord Cohen. But this is not the statutory language, and for less gifted mortals than these three I think it is perhaps less conducive to error to stick closely to the statutory language—and this is precisely what was done by Lord Radcliffe. He said, at page 707:

> "It is, as he says, near the line. I do not imply by that that I find any particular difficulty in deciding upon which side of the line it lies; but it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, and in another instance is not, a 'perquisite or profit . . . therefrom'. The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise 'from' the office or employment. In the past several explanations have been offered by Judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such'. It has been said that it must have been made to him 'in his capacity of employee'. It has been said that it is assessable if paid 'by way of remuneration for his services', and said further that this is what is meant by payment to him 'as such'. These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the Statute. But it is perhaps

(1) 38 T.C. 673, at p. 696.

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worth observing that they do not displace those words. For my part I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which is in question here was paid to the Respondent for acting as or being an employee that I regard it as not being profit from his employment. The money was not paid to him as wages. The wages of employees are calculated independently of anything which they get under the housing scheme, and the I.C.I. salaries compare favourably with salaries paid by other employers in the chemical industry who do not operate a housing scheme. We are bound to say on the facts found for us that the source of the £350 was the housing agreement into which the Respondent had entered on 1st June, 1951, and that the circumstance that brought about his entitlement to the money was not any services given by him but his personal embarrassment in having sold his house for a smaller sum than he had given for it."

It appears to me that the correct test as stated by Lord Radcliffe is that, for any sum paid to the employee to be assessable to income tax, it must be paid to him "in return for acting as or being an employee", and for no other reason. Mr. Nourse, for the taxpayers, was disposed to accept this formulation of the correct test, but he interpreted it as indicating that the sum must be paid to the employee in respect of services rendered by him, and he stressed correctly and forcibly that in this case there was no connection at all between the distribution of the capital of the trust fund and the rendering of services. The yearly distribution of income was an obvious carrot designed to produce an increase in effort from the employees, but the distribution of the capital of the trust fund was a once and for all operation which happened fortuitously, which no employee could have counted upon before it happened so as to encourage him to increase his effort, and which, once distributed, could have no conceivable effect on this effort thereafter. In my view, however, this is not what Lord Radcliffe meant, principally because this is not what he said. He says "in return for . . . being an employee", and I think he meant just that. The matter becomes still clearer, I think, if one refers to two very short passages in the judgments of Sir Richard Henn Collins M.R. and Stirling L.J. in *Herbert* v. *McQuade*(1) (the Clergy Sustentation Fund case) reported in [1902] 2 K.B. 631. At pages 649 and 650–1 respectively, they said this. First of all, Sir Richard Henn Collins M.R.(2):

". . . a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that the money has come to, or accrued to, a person by virtue of his office—it seems to me that the liability to income tax is not negatived merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money to pay it."

Stirling L.J.(3):

"I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the

(1) 4 T.C. 489. (2) *Ibid.*, at p. 500. (3) *Ibid.*, at p. 501.

A fulfilment of any further or other condition on his part; and what we have to determine is whether the sum in question does so come to the holder of this office."

These passages were cited by Jenkins L.J. in *Hochstrasser* v. *Mayes*(1), and he goes on to say that the payments made by the employer in that case did not satisfy this test. No criticism of these passages was made in the House of B Lords in that case, or has, so far as I am aware, since been made, save as to the words "as such". If one leaves those words out, the sense of the passages is still quite clear. It is quite clear that Lord Radcliffe had these particular passages well in his mind, because he refers to them quite unmistakably in the passage I have already read from his judgment. Hence, when he says "in return for . . . being an employee" I have no doubt at all that he meant just C that. It may be, indeed, that at the end of the day there is only a semantic difference between the interpretation I place upon this passage and the interpretation which Mr. Nourse would have me place upon it, in that an employee is a person who renders services, so that "in return for . . . being an employee" may possibly be correctly expanded into "in return for being a person who renders services" and then once more contracted into "in return for rendering D services".

I would add here, out of deference to the arguments addressed to me by Mr. Nourse and Mr. Turner, that I do not find anything in any of the cases which were cited to me, or indeed in any others which my own researches have unearthed, anything at all to suggest that my understanding of Lord Radcliffe's words is not fully in accordance with them all. Of course, as I have already E said, I accept fully that the mere circumstances that a payment is made whilst a person is holding a particular office is far from conclusive of the fact that he receives it "in return for acting as or being an employee". This is because the payment may well be an expression of gratitude or a personal testimonial (as, for example, in *Bridges* v. *Bearsley*(2) (1957) 37 T.C. 289). But I do not accept, as inferentially urged by Mr. Nourse, that there is, as it were, a *tertium quid*; F namely, a case where a payment is made to an employee merely because he is an employee, but which payment is not by way of remuneration to him. I think that this was clearly the view of Willmer L.J. in *White* v. *Franklin*(3) (1965) 42 T.C. 283, a case on the scope of "earned income", where the emolument cases, including *Hochstrasser* v. *Mayes*, were much in point and thoroughly discussed. At page 294, he said:

G "The distinction drawn is between payments made to the holder of the office on grounds which are purely personal to him (which are not taxable) and payments which do come to him by virtue of his employment; that is to say, as a reward for his services."

Nor do I think that Lord Simonds in *Hochstrasser* v. *Mayes* was intending to say anything to the contrary either when he approved a passage from the H judgment of Upjohn J. or when he said anything else in his speech, for at the end of it all he sums it up thus, at page 706: "I accept, as I am bound to do, that the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office". As I have noted, I think that all the cases in the books, although the language used in many of them appears far more complicated, are consistent with this simple view.

(1) 38 T.C. 673, at p. 695. (2) [1957] 1 W.L.R. 674. (3) [1965] 1 W.L.R. 492.

(Walton J.)

Now, how did the payments come to be made in the present case? If one takes the narrower formulation of the evidence to which it is permissible for the Court to have regard—namely, exclusively the terms of the trust deed of 25 September 1963—it appears to me that there is no conceivable room for argument. The capital of the trust fund is distributable between persons who were employees or former employees in receipt of pensions at the date of determination of the scheme. In order to qualify to receive a payment, there is no further or other condition that such persons must satisfy other than that of employment or former employment. They therefore appear to me to satisfy Lord Radcliffe's test of receiving their payments simply because they are employees, or have been employees, and for no other reason and with no other qualification whatsoever.

As I have already indicated, I think that, since the payments here in question have all been made pursuant to the provisions of the trust deed of 25 September 1963, it is to the terms of that deed and the terms of that deed only that I am bound and entitled to look. But I do not think that the picture changes in one whit if I am, contrary to my own opinion, bound or entitled to enlarge the horizons to be surveyed. If one looks at the purpose behind the trust deed itself, that is quite clearly as set out in the paragraphs of the letter in the explanatory booklet which I have already read; that is to say, the whole purpose of the trust deed was to provide an additional incentive for the employees of the group of companies of which the company was the holding company by giving them a form of bonus or profit-sharing additional to their wages. It cannot, I think, make any difference that the precise distribution which is now in question was one which was never envisaged as being likely to take place within the foreseeable future when the deed was executed. The whole purpose of the scheme, so it appears to me, was one and indivisible. If one then enlarges the matter still further so as to take into account in the fullest possible manner every single circumstance connected with the ultimate distribution, what difference does that make? The only new factor which such circumstances throw up, as it appears to me, is that the actual occasion for the distribution was purely fortuitous. It was, in a sense, the by-product of the merger between the company and Dobson Hardwick Ltd. In this sense, it was said by Mr. Nourse and Mr. Turner that the payment was "fortuitous", was a "windfall", a "gamble", and many other similar phrases all indicating the wholly uncertain nature of the date of distribution. All this is in one sense doubtless perfectly true; but the fact that the date of distribution, and hence the membership of the class to take, was at the inception of the scheme embodied in the trust deed wholly uncertain, does not appear to me to make any difference to the real question which I have to determine, which is: when the uncertainty did in fact crystallise out, when the class was in fact ascertained, why was any payment made to such persons as were members of such class? The answer is, Because they were members of the class described in clause 8 of the trust deed, and there never is or can be any uncertainty as to the qualifications for membership of that class, as distinct from the quite separate point as to whether any particular person fulfils those qualifications at the relevant moment in time. Hence, in my view however one looks at the matter, there can be no question but that the claim of the Crown in the present case is unanswerable. I think that no answer has been really attempted, much less given, to the commendably brief and accurate manner in which Mr. Davenport stated the Crown's case: "An employee receives it (the distribution) because he is an employee without any other qualification than that he was an employee at a particular date."

A There are one or two other matters to which I should, I think, pay some attention. In this case the trustees, as has been seen, when effecting the distribution, took qualifying service, in various bands, into account. This circumstance was relied upon by the Crown as a pointer—albeit no more than a pointer—to the general underlying purpose of the scheme. I do not think that this can be correct. I cannot think, where one has a trust deed with a trust for division B amongst employees in such proportions as the trustees think fit, that it can be open to the trustees by their mode of selection of the proportions to alter or affect the character in which the employees receive their shares. The character in which such receipt is to take place is determined once and for all by the provisions of the deed.

If I return to the reasons given by the Special Commissioners for allowing C the taxpayers' appeals, and for one moment following them in their use of the contrasting expressions "*causa causans*" and "*causa sine qua non*", it appears to me most clear that their conclusion that the *causa causans* of the payments was the decision to wind up the scheme is at best a partial truth. It is true in the sense that the decision to wind up the scheme was the *causa causans* of the payments being made at the time they were made: but that is not the subject D matter of the present enquiry at all. The subject matter of the present enquiry is why the payments were made to the persons to whom they were made; and the *causa causans* of that was, as it could only be, the provisions of clause 8(c) of the trust deed.

Accordingly, for these reasons, in my judgment, the appeal of the Crown must be allowed, and the assessment in each case restored by the addition of E £100 thereto.

Davenport—My Lord, I would ask that the appeals should be allowed with costs. Your Lordship has just stated that the assessments should be restored. Purely as a matter of wording, your Lordship will recollect that the assessments included the £100 and the Special Commissioners then reduced each of them by £100. I wonder whether your Lordship would think that an appropriate form F of words would be that your Lordship should order that the assessments as made be confirmed? There might otherwise be difficulty, in saying that the assessments should be increased or reduced, as to whether one was referring to the original assessments, which I submit would be the correct interpretation, or the assessments as altered by the Special Commissioners. I would submit that the appropriate order would be that the assessments as made be confirmed.

G **Walton J.**—You want me to allow the appeals and confirm the assessments as originally made?

Davenport—Yes, my Lord. I would also ask for costs.

Walton J.—What do you say, Mr. Turner?

Turner—I cannot oppose that, my Lord.

Walton J.—Then the appeals will be allowed with costs and the assess- H ments as originally made confirmed.

Davenport—That is, both appeals, my Lord?

Walton J.—Yes: both the appeals allowed and both the assessments as originally made confirmed.

Davenport—I am much obliged, my Lord.

The taxpayers having appealed against the above decision, the cases came before the Court of Appeal (Russell, Stamp and Geoffrey Lane L.JJ.) on 28, 29 and 30 July 1975, when judgment was reserved. On 3 October 1975 judgment was given unaminously in favour of the Crown, with costs.

Martin Nourse Q.C., *Joseph Turner* and *P. St. J. H. Langan* for the taxpayers.

Peter Rees Q.C. and *Brian Davenport* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgment:—*Reed* v. *Seymour* 11 T.C. 625; [1927] A.C. 554; *Moorhouse* v. *Dooland* 36 T.C. 1; [1955] Ch. 284; *Simpson* v. *John Reynolds & Co. (Insurances) Ltd.* 49 T.C. 693; [1974] 1 W.L.R. 1411; *Chibbett* v. *Joseph Robinson & Sons* (1924) 9 T.C. 48; *Laidler* v. *Perry* 42 T.C. 351; [1966] A.C. 16; *Wales* v. *Tilley* 25 T.C. 136; [1943] A.C. 386; *Dale* v. *de Soissons* (1950) 32 T.C. 118.

Russell L.J.—The judgment I am about to deliver is the judgment of the Court [Russell, Stamp and Geoffrey Lane L.JJ.]

These appeals from Walton J. concern the question whether payments received in 1971 by the taxpayers from trustees of a settlement of shares in a company ("Park"), on the termination of a scheme for the benefit of employees of the company, were emoluments or profits "from" the employment of the taxpayers and so liable to tax under Schedule E by virtue of ss. 181 and 183(1) of the Income and Corporation Taxes Act 1970. The Special Commissioners found that they were not. Walton J. found that they were.

In 1963 certain shareholders in Park wished to sell their shares but all concerned were anxious that the purchasers should be acceptable to the management. At the same time the board wished to introduce a profit-sharing scheme by which employees of Park and its subsidiaries should gain directly over and above their salaries and wages from the profitability of the company's business, giving them an incentive and a share of the group's profits. A scheme was devised by which the company borrowed a substantial sum from bankers and lent the sum interest-free to trustees appointed by the board to enable the trustees to buy the shares in Park from the shareholders already mentioned, to be held upon the trusts of a deed dated 25 September 1963. The trusts of the deed being for the benefit of employees the lending by the company was not a contravention of s. 54 of the Companies Act 1948. The deed was between the company and the named trustees. By recital (C) it was recited:

> "The Company desires to institute a Scheme for the benefit of its employees or certain of them of the nature envisaged by Section 54(1)(b) of the Companies Act 1948 and for that purpose has now paid to the Present Trustees the sum of Seven hundred thousand pounds (in part provided by monies advanced by Williams Deacons Bank Limited) (hereinafter called 'the Bank') to be applied in manner hereinafter appearing and it is desired to record (without intending by this recital to create any trust or to use the word 'employees' in any particular sense) that in relation to such Scheme and this Deed the primary object is that Ordinary Shares in the Company acquired for the purposes of this Deed shall provide income (normally by means of receipt of dividends from such shares) for division between employees."

A Clause 3 empowered the trustees to accumulate income for the purpose of reducing the indebtedness to the company and enabled the trustees for the same purpose to dispose of constituents of the trust fund. Subject to the power to apply income in repayment of the debt, clause 5 provided for the distribution of income of the trust fund as follows:

> "The Trustees shall hold the dividends from Ordinary Shares in the
> B Company or other the income of the Trust Fund received by them in trust (subject to their discretion under clause 3(1) hereof) to divide the same between the Employees at the time of such receipt in each case in such proportions (exclusive of one or more of the Employees) as the Trustees shall think fit to determine within one calendar month of such receipt in each case and failing such determination between the Employees
> C at the time of such receipt in each case equally Provided Further that the Trustees may with the consent of the Company at any time within six months from the date of this Deed make Rules in writing for or dealing with (in such manner as the Trustees think fit) the apportionment of the divisible income of the Trust Fund (up to the time when this Scheme terminates) between the Employees and such Rules when made shall
> D thereupon take effect in substitution for the foregoing provisions of this clause and such substituted provisions shall accordingly be subject to the power contained in clause 13 of this Deed."

"Employee" was defined by clause 1 as follows:

> " 'Employee' means a person of either sex (other than a director of the Company but including a director of any subsidiary company of the
> E Company who is not a director of the Company) who is in the full time employment of the Company and has attained twenty one years of age and includes an apprentice (who has attained twenty one years of age) Provided Further that for the purpose of this present definition i.e. of the word 'Employee' the expression 'the Company' includes Parks Forge Limited English Tools Limited A. & F. Parkes Limited A. Morris & Sons (Duns-
> F ford) Limited Gullick Limited Herbert Cotterill Limited Hope Hydraulics Limited Thomas Gaskell & Co. Limited Scotts (St. Helens) Limited and any other company for the time being a subsidary of the Company."

Thus far there is provision for employee participation in profits so long as the scheme continued. Clause 7 provided for the termination of the scheme as follows:

> G "The Scheme shall forthwith determine (a) at the expiration of one year after the date upon which the Company shall have given notice in writing to the Trustees of its intention to determine the same or (b) if an order is made or an effective resolution passed to wind up the Company or (c) at the expiration of twenty years from the day of the death of the last survivor of the lineal descendants now living of his late Majesty
> H King George V."

It is under clause 8 that the sums now in question were received by the taxpayers from the trustees. Clause 8, so far as material, is as follows:

> "On the determination of the Scheme the Trustees shall as soon as practicable realise the Trust Fund and shall apply the net proceeds of such realisation and any undisposed of income of the Trust Fund as follows:
> I (a) in paying to the Company the amount of the Debt or such part of the

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same as shall then be owing and subject thereto . . . (c) in distributing the balance if any among the Employees and former employees in receipt of pensions from any Funds or Schemes under which they shall be entitled by virtue of having been an employee respectively as at the date of the determination of the Scheme (other than Employees (if any) who shall after such date and prior to such distribution have been dismissed for misconduct or incompetence) in such proportions as the Trustees shall within the year next following the date of the determination of the Scheme by writing determine and in default of such determination between the said Employees and former employees ascertained as at the said date of determination in equal shares."

The scheme was operated for some years. In the course of those years, out of net dividends some £111,000 had been repaid off the debt to the company and some £108,000 distributed to employees, each division being in equal shares without regard to rates of pay or length of service. Meanwhile, in 1969, there was a merger between the company and another company which took the form of a new holding company being formed which acquired the issued share capital of both companies in exchange for shares in the holding company, of which the trustees received their due proportion. It becoming apparent to the trustees and the board of the company that the scheme was not appropriate to the new structure, the company gave notice determining the scheme, as it had an absolute right to do under clause 7. The trustees consequently sold their shareholding in the holding company and, after paying off the indebtedness to Park, had in their hands some £370,000 for distribution under clause 8 among 1,802 qualified employees and 49 qualified pensioners. This £370,000 in effect represented in part dividends of earlier years used in paying off indebtedness to the company under clause 3, and in other part growth of the capital value of the trust fund by bonus issues and otherwise. The trustees in due time, on 21 June 1971, resolved upon a scheme for distribution, to some extent proportionate to lengths of service but not related to size of salary or wage, which resulted in entitlements varying from £66 to £334. Each of the two present taxpayers became entitled to £200; each was paid £100 on account; each was assessed to tax under Schedule E in respect of his £100; and each appealed to the Special Commissioners. There is no distinction between the two cases in principle and hereafter we speak of one taxpayer who constitutes, of course, a test case.

The contents of recital (C) of the deed have already been noted. At the time the scheme was launched it was announced to employees in a notice of the same date in this form: it is headed "Wm. Park & Co. Forgemasters Limited", dated 26 September 1963:

"Notice to all Group employees. Profit sharing scheme. The Directors of this Company have been desirous for some time of instituting a scheme whereby employees of the Group had an interest in the shares of this Company and a means of sharing in the profits of the Group. The Estate of the late S. R. Park and members of the Park family (notably Mr. Cyril J. Park and Mr. Brian H. Park) have now made this possible by making available a large block of shares held by them. A Trust has been formed to purchase the shares so made available and the Company has agreed to advance an Interest-Free Loan to the Trust for the purchase of the shares. The shares will then be held in trust for the benefit of all employees of the Group (other than Directors of the Parent Company) 21 years of age and over of either sex and after a qualifying period of employment. The precise

A rules of the Trust will be published later but the annual income from dividends on such shares will be used partly to repay the loan and partly by distribution to the employees according to the rules of the Trust. On full repayment of the loan the whole income of the Trust will be available for distribution to employees according to the Rules of the Trust. . . . A summarised copy of the Rules of the Trust will be sent to each eligible
B employee as soon as possible."

In fact, no rules were ever drawn up. A booklet on these lines was issued in August 1965 containing explanatory notes for guidance of employees in the form of questions and answers. One question and answer was as follows:

"Apart from income have I any rights under the scheme? (Answer): Yes. Subject to repayment of the original loan etc., the shares are held
C in Trust for employees and in the unlikely event of the scheme being terminated you may be eligible for a Share in the residue. This is a complicated matter, however, and is set out in some detail in the relevant Trust Deed."

It is clear that, as was natural, the scheme was made known to employees: it was to be an incentive.

D The Special Commissioners found that the scheme was at its inception intended by all concerned to continue indefinitely, subject to the perpetuity long-stop to avoid invalidity. The Case Stated contains the following finding of fact, at para. 5:

"(13) We find as a fact that in terminating the scheme the board of Wm. Park were primarily actuated by factors arising from the merger of
E Wm. Park and Dobson and that the distribution of the balance of the trust funds to employees was not an object of their decision but only an incidental consequence."

It is convenient at this stage to notice that the Special Commissioners concluded in their decision that the decision of the company to terminate the scheme was the *causa causans* of the receipt by the taxpayer of his terminal
F distribution; that his employment was merely the *causa sine qua non* and that the trustees' decision to apportion or allot payments on the basis mentioned (as distinct from allowing the provision for equal division in default to operate under the deed) was not an act of rewarding employees for their services.

The question in any case whether a receipt by an employee is to be regarded for present purposes as "emoluments or profits from" the employment has given
G rise to a number of judicial attempts to analyse or define or elaborate upon those words. Both sides, however, are at one in accepting the language of Upjohn J. approved by the House of Lords in *Hochstrasser* v. *Mayes*(1) [1960] A.C. 376, at page 388.

"In my judgment", Upjohn J. said(2), "the authorities show that to be a profit arising from the employment the payment must be made in
H reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future."

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(1) 38 T.C. 673, at p. 705. (2) *Ibid.*, at p. 685; [1959] Ch. 22.

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To this may be added the phrase of Lord Radcliffe in the same case at page 391(1): A

> "The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise 'from' the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such'. It has been said that it B must have been made to him 'in his capacity of employee'. It has been said that it is assessable if paid 'by way of remuneration for his services', and said further that this is what is meant by payment to him 'as such'. These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think that their C meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee."

It is common ground that in every case the question must be answered having regard to all the circumstances which are connected with and precede D the receipt in question. Counsel for the Crown, in our view rightly, felt themselves not able to support the view to which Walton J. inclined, that *Patrick* v. *Burrows* (1954) 35 T.C. 138 required him to confine himself to the four corners of the deed of September 1963. Additionally, we would approve the way in which Megarry J. approached the matter in *Pritchard* v. *Arundale*(2) [1972] Ch. 229, where he said that there were not in truth several questions involving E the decision into which of several compartments the receipt was to be fitted, but only one question, that is to say, whether it is shown (though this is not of course a question of onus) that the receipt had the taxable quality of remuneration or reward for services. Cases in the books have tended to treat the question as one in which, if there was not merely a payment on personal grounds as a testimonial to personal qualities of the employed recipient, it must be reward F for services, and *vice versa:* but those were cases in which the facts made it necessary that it should be either the one or the other, and they are not inconsistent with the true situation that in every case there is the one question which must be answered in the one sense if the receipt is to be brought within the charge to tax under Schedule E.

We return to the question whether the payments now in question are G properly to be regarded as a reward for and referable to services of the recipients. It might, it seems to us, be thought that, since in the exercise of their right to allocate in different proportions the trustees chose to calculate different amounts for different people on a basis of length of service, that fact itself stamped the receipts with the necessary taxable quality: but the Crown did not make that submission in this Court, and we say no more about it. The Crown's contention H may be shortly stated. From its very birth the scheme was plainly intended as an incentive scheme both to encourage and to reward employees in respect of their services as such. Payments made during the years before the scheme was terminated were therefore plainly profits from the employment as being rewards for and referable to services, though having regard to the source from which the payments were made (dividends received under deduction of tax) I this would be relevant to the parallel statutory provisions on earned income

(1) 38 T.C. 673, at p. 707. (2) 47 T.C. 680.

A relief rather than to Schedule E, and there was no sound ground for distinguishing in this respect the terminal payments now in question. So far as it concerned the views of the Special Commissioners, they had, the Crown submitted, manifestly erred in their conclusion that the payments were not "profits from" the employment because the *causa causans* was the decision of the company to determine the scheme because it had ceased to be appropriate to the new inter-
B company structure: and we agree with that submission.

Counsel for the Appellant would not accept the Crown's contention as to the pre-termination receipts, a question that was not before the Court. However, in our judgment, it is necessary to express a view thereon in reaching a decision on the question that is before us and, in our opinion, this contention of the Crown is plainly correct.

C For the Appellant it was contended that in any event there was all the difference in the world between the pre-termination payments and the terminal payments. It was said that the latter were not to be expected: their probability for any employee at any time was very remote: they were fortuitous windfalls: they could not be regarded as truly part of an incentive scheme based on profit-sharing, more particularly in that they were terminal payments winding up the
D trust fund: the proper inference was that the trust deed only contained the provisions under which they were made because *some* ultimate provision was necessary and employees had to be chosen as the ultimate beneficiaries to escape s. 54 of the Companies Act 1948. It was further contended that the trustees could have exercised their discretion over allocation by concentrating on the needy, but this contention assumes the answer in favour of the Appellant
E on the main question, which is whether the provision was intended as a reward for services.

In our judgment the contention of the Crown is correct. We do not consider that the provision for terminal payments can be considered as, so to speak, a throwaway provision bearing no colour of reward for services. The very existence of the discretion to allocate is against this inference. It appears
F to us that the scheme is one scheme based fundamentally on reward for services by employees and the fact that after the final payment there is no more by way of bonus to look for does not relevantly distinguish that final payment. Moreover, there are two particular points which indicate that in truth these final payments are rewards for and with reference to services. First, pensioned ex-employees, who *ex hypothesi* will be such because of the services they have
G rendered to the company, are brought into the class of recipients. Second, if an employee who is such at the date of determination of the scheme and would otherwise qualify is in the period (up to a year) between then and distribution dismissed for misconduct or incompetence, he is excluded from benefit. Such misconduct or incompetence clearly would be referable to his services, and the deprival being referable to his services, so should be regarded his entitlement.

H We accordingly dismiss both appeals.

Davenport—My Lord, I ask for the appeals to be dismissed with costs.

Russell L.J.—We seem to be a bit thin on the ground.

Davenport—We have telephoned. Mr. Turner, who was Mr. Nourse's Junior, comes from Liverpool, and whether something has gone wrong in communications or in the train, I do not know. If your Lordships would

prefer this application to be made later, we would have no objection if the application were considered by two of your Lordsips, if my Lord Russell L.J. were unable to be here. I say straightaway I appreciate the inconvenience that will arise. A

My Lord, Mr. Langan has just arrived in this matter. He did not have the benefit of hearing your Lordships' judgment, except possibly the last words.

Russell L.J.—The last words are the significant words. There is no question here, I take it, of any legal aid? B

Langan—My Lord, I am in this difficulty, that I only heard about this case ten minutes ago.

Russell L.J.—Something has gone wrong. We did sit at 10 o'clock at the request of Counsel on your side.

Davenport—It was my side, and I am deeply grateful personally to your Lordship. I understand, if it is of any assistance to your Lordships, that there is no question of legal aid here, because Mr. Nourse did say that he had to get the permission of the Vice-Chancellor of the County Palatine, who has the matter in his control, in order to appeal, because the question of costs arose and the costs have to be paid out of the trust fund. No question of legal aid arose in the Court below, and your Lordships will recollect that he has to get permission. C D

Russell L.J.—This is a test case, is it not?

Davenport—It is a test case.

Russell L.J.—I have no doubt that the matter of costs will in fact be solved by the Vice-Chancellor actually reimbursing them out of the trust funds.

Davenport—I apprehend that to be the position.

Russell L.J.—There seems to be no reason, as at present advised, why this appeal should not be dismissed with costs. So we will make that Order; but we will give liberty to apply, on the question of costs, to two of us, in case somebody has some brilliant idea which at the moment has escaped all of us. E

Langan—My Lord, may I say how sorry I am that neither Counsel briefed on the hearing of the appeal was present this morning. Apparently something went wrong in the chain of communications and I am extremely sorry. F

Russell L.J.—Your instructing solicitors are not here either.

Langan—Technically, I think I have no instructions to appear before your Lordship.

Davenport—My Lord, may I just mention the question of leave to appeal. I apprehend, but I cannot say for certain, that if Mr. Nourse or Mr. Turner had been here, they would have asked for leave to appeal. I do not know whether your Lordships wish to deal with it. I would not be opposing it in any way at all and would be saying to your Lordships, if it would be of assistance, that as a matter of fact it is considered by those behind me that this judgment is likely to affect a number of similar schemes which in due course, for one reason or another, must terminate. That is what I would be saying if there were an application for leave to appeal, if your Lordships wished, rather than facing the difficulty and inconvenience of perhaps reconvening, to deal with that matter, if my friend were to make an application. It does not cost his clients anything to make the application. They do not have to take it up if they do not want to. G H

I would be addressing your Lordship with those remarks if the application had been made, and your Lordships might perhaps in those circumstances, although I cannot say more, have been minded to give leave. The tax involved is the tax on £370,000. So there is a very substantial amount involved. Your Lordship will recollect that a considerable number of cases were cited and gone through in the course of the argument, although not in the course of the judgment. Therefore, rather than putting the parties to the difficulty of the parties coming back and your Lordships re-assembling, your Lordships might feel, if an application were made, that your Lordships would be prepared to deal with it.

Russell L.J.—You have put the case for granting leave to appeal very well.

Davenport—We do not want to oppose it.

Russell L.J.—Mr. Langan, may we assume that you are chancing your arm without instructions to ask for leave to appeal?

Langan—Your Lordship may.

Russell L.J.—On that basis, we grant leave to appeal.

The taxpayer in the first case (Samuel Milner) having appealed against the above decision, that case came before the House of Lords (Lords Wilberforce, Diplock, Simon of Glaisdale, Kilbrandon and Edmund-Davies) on 4 and 5 October 1976, when judgment was reserved. On 27 October 1976 judgment was given unanimously in favour of the Crown, with costs.

Martin Nourse Q.C. and *Joseph Turner* for the taxpayer.

Peter Rees Q.C. and *Brian Davenport* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Herbert* v. *McQuade* 4 T.C. 489; [1902] 2 K.B. 631; *Reed* v. *Seymour* 11 T.C. 625; [1927] A.C. 554; *Moorhouse* v. *Dooland* 36 T.C. 1; [1955] Ch. 284; *Hunter* v. *Dewhurst* (1932) 16 T.C. 605.

Lord Wilberforce—My Lords, in 1963 William Park & Co. Forgemasters Ltd. decided to set up a profit-sharing scheme for the benefit of its employees. A sum of £700,000 was provided on loan to trustees, who were to use it to purchase shares in the company to be held upon the trusts of the scheme. These trusts were declared in a deed dated 25 September 1963. Dividends on the shares were to be used either to pay off the loan or to make payments to employees of the company and the scheme was so operated. Some £111,000 was applied in repayment of the debt and £108,000 was distributed to employees, who individually received sums from £9 to £14 a year after deduction of tax. Then in 1969 a change took place. The company became a subsidiary of a holding company which also controlled an allied undertaking, and the directors had to decide what to do with the scheme. They decided that it was impracticable to continue it and so they used the power, which they had under the trust deed, to terminate the scheme by one year's notice. The trustees then realised the trust assets, paid off the balance of the debt and, in accordance with the clause in the trust deed which provided for this situation, they decided to distribute the

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balance in proportions fixed by them between 1,802 employees and 49 pensioners. Mr. Milner, the Appellant, was one of the employees and he became entitled to £200. When the Revenue heard about this they decided to assess him to income tax under Schedule E.

The test under Schedule E, now set out in ss. 181(1) and 183(1) of the Income and Corporation Taxes Act 1970, is whether the sum in question is an emolument from the taxpayer's employment. "Emoluments" include any perquisite or profit. The only question in this, and in the many similar cases which come before the courts relating to such payments as cricketers' or footballers' benefits or for Easter offerings, or housing subsidies, is whether the emolument can be said to arise "from" the employment or office. In some instances, as the decisions show, this is not an easy question to answer: here it is plain.

The taxability of the annual distributions under the scheme is not an issue in this appeal, but nobody has suggested or could suggest that these were not taxable. The only question is whether any ground could be found for distinguishing the capital payments made on the winding-up of the scheme. In my opinion, with all respect to the efforts of learned Counsel for the taxpayer, there is no ground for any such distinction. I shall not attempt to demonstrate this by detailed analysis of the trust deed, or by reference to such authorities as may, possibly, be relevant, since this has been done to my complete satisfaction by the Court of Appeal, affirming Walton J. To restate the argument in words of my own, even if this were to result in a difference of formulation, would not be productive of advantage, and I am more than content fully to adopt the single judgment of the Court of Appeal delivered by Lord Russell of Killowen.

The appeal can only be dismissed.

Lord Diplock—My Lords, I agree.

Lord Simon of Glaisdale—My Lords, the issue in this appeal has, in my respectful opinion, been satisfactorily disposed of in the unanimous judgment of the Court of Appeal delivered by my noble and learned friend, Lord Russell of Killowen. There is, indeed, little that can be added.

As the argument developed before your Lordships, there appeared to be some danger that the task of interpretation should be focussed, not on the words of the Statute, but on various judicial glosses of those words. What Lord Radcliffe said in *Hochstrasser* v. *Mayes*(1) [1960] A.C. 376, at page 391, is therefore in point:

> "In the past several explanations have been offered by judges of eminence as to the significance of the word 'from' in this context. It has been said that the payment must have been made to the employee 'as such'. It has been said that it must have been made to him 'in his capacity of employee.' It has been said that it is assessable if paid 'by way of remuneration for his services,' and said further that this is what is meant by payment to him 'as such.' These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words."

Lord Radcliffe did not include among the glosses which he thus reviewed a distinction between "*causa causans*" and "*causa sine qua non*", though this distinction has had some eminent users in this context, and the concept was

(1) 38 T.C. 673, at p. 707.

A strongly pressed on your Lordships on behalf of the Appellant. It was said that the *causa causans* of the payment was the decision to wind up the scheme: the Appellant's employment was no more than its *causa sine qua non*. The distinction between a "*causa causans*" and a "*causa sine qua non*" was formerly much used in other branches of the law; but it was found to confuse rather than to illuminate (see Lord Wright in *Smith, Hogg & Co. Ltd.* v. *Black Sea and* B *Baltic General Insurance Co. Ltd.* [1940] A.C. 997, at page 1003, cited by Megarry J. in *Pritchard* v. *Arundale*[1] [1972] Ch. 229, at pages 237–8) and it has been generally abandoned. Causation has been debated by metaphysicians and logicians throughout the recorded history of philosophy: the debate continues, with more sophisticated tools of analysis than the terms "*causa causans*" and "*causa sine qua non*". These will rarely if ever assist the law, where they have C frequently been used without definition or analysis. On the face of it "*causa causans*" is a tautology. "*Causa sine qua non*" seems to have been used in two senses: first, to denote a matter which has had no effect on the situation before the Court, but has merely provided a setting for a matter which has had such an effect; and, secondly, to denote a matter which has had some effect, but which, other matters having had a more potent effect, it is the policy of the law to D disregard. In my respectful submission these terms are of little assistance in solving the problem before your Lordships. But even were I to think that the issue before your Lordships could be determined by outmoded and ambiguous concepts of causation couched in Latin, I would not, with all respect, be prepared to accept the Appellant's categorisation.

A far less question-begging test was suggested by Lord Radcliffe in *Hoch-* E *strasser* v. *Mayes*[2] and by Lord Reid in *Laidler* v. *Perry*[3] [1966] A.C. 16. The former case was concerned with a large employer, many of whose employees (including the taxpayer) were required by their service agreements to be prepared to move to new work locations. Their moves might well involve the sale of their houses at a loss. The employer undertook to make good any such loss. The question was whether such compensatory payment was taxable under F Schedule E. Lord Radcliffe said, at page 392[4]: "The essential point is that what was paid to [the taxpayer] was paid to him in respect of his personal situation as a house-owner . . ." If the payment to the appellant was not made to him in respect of his personal situation as an employee, in what respect was it paid to him? This question was not answered. Lord Reid adopted a complementary approach in *Laidler* v. *Perry*[5] at page 30 B/C: ". . . we must always return to the G words in the statute and answer the question—did this profit arise from the employment? The answer will be 'no' if it arose from something else." It was conceded that payments to the instant taxpayer from the income of the trust fund arose relevantly from the Appellant's employment. From what else did the capital payment arise?

I would dismiss the appeal.

H **Lord Kilbrandon**—My Lords, in my opinion the disposing of this appeal does not call for yet another attempt to substitute some exegetical phrase for the simple words of s. 181(1), namely, emoluments from any office or employment. I prefer to adopt the approach taken by Lord Reid in *Laidler* v. *Perry*[5] [1966] A.C. 16, at page 30:

"There is a wealth of authority on this matter and various glosses on I or paraphases of the words in the Act appear in judicial opinions, including

(1) 47 T.C. 680, at p. 687. (2) 38 T.C. 673. (3) 42 T.C. 351.
(4) 38 T.C. 673, at p. 708. (5) 42 T.C. 351, at p. 363.

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speeches in this House. No doubt they were helpful in the circumstances of the cases in which they were used, but in the end we must always return to the words in the statute and answer the question—did this profit arise from the employment? The answer will be 'no' if it arose from something else."

Taking that approach, I find myself in entire agreement with the conclusion arrived at by the Court of Appeal, and there is little more that need be said.

It is conceded that the income payments made from the trust fund to employees arose from their several employments and were properly taxable in their hands. It was therefore necessary for the Appellant to show that, by contrast, the payment out of capital, to use Lord Reid's words, "arose from something else". It was submitted that the payment arose not from the Appellant's employment but from the company's reluctant decision to wind up the profit-sharing scheme. I cannot agree with that. Certainly the money forming the payment became available in consequence of certain events and decisions connected with the structure of the company. But the sole reason for making the payment to the Appellant was that he was an employee, and the payment arose from his employment. It arose from nothing else, as it would have done if, for example, it had been made to an employee for some compassionate reason. In such a case, as Lord Reid pointed out in *Laidler* v. *Perry*(1) (*supra*), at pages 31–2, "the gift is not made merely because the donee is an employee". There would be another reason personal to the recipient, namely his distress. There is no such other reason here.

I would accordingly dismiss this appeal.

Lord Edmund-Davies—My Lords, I respectfully concur with the judgment of my noble and learned friend on the Woolsack and would accordingly dismiss this appeal.

Appeal dismissed, with costs.

[Solicitors:—Solicitor of Inland Revenue; Field, Fisher & Martineau, for Arthur Smith & Broadie-Griffith, Wigan.]

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(1) 42 T.C. 351, at p. 364.