HIGH COURT OF JUSTICE (CHANCERY DIVISION)—18TH, 19TH AND 20TH DECEMBER, 1957

COURT OF APPEAL—9TH, 10TH AND 11TH JUNE, AND 7TH JULY, 1958

HOUSE OF LORDS—13TH, 14TH AND 15TH OCTOBER, AND 30TH NOVEMBER, 1959

Hochstrasser (H.M. Inspector of Taxes)

v.

Mayes[1][2]

Jennings

v.

Kinder (H.M. Inspector of Taxes)[1]

Income Tax, Schedule E—Employer's housing scheme—Employee transferred in course of employment—Compensation for loss on sale of house—Income Tax Act, 1952 (15 *&* 16 *Geo.* VI *&* 1 *Eliz.* II, *c.* 10), *Sections* 156 *and* 160 *and Ninth Schedule, Paragraph* 1.

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 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;* (2) *in the Chancery Division, that the payment in J's case was not made in respect of expenses within the meaning of Section* 160.

(1) Reported (Ch.D.) [1959] Ch. 22; [1958] 2 W.L.R. 982; 102 S.J. 419; [1958] 1 All E.R. 369; 225 L.T.Jo. 75; (C.A.) [1959] Ch. 22; [1958] 3 W.L.R. 215; 102 S.J. 546; [1958] 3 All E.R. 285; 226 L.T.Jo 111.

(2) Reported (H.L.) [1960] A.C. 376; [1960] 2 W.L.R. 63; 104 S.J. 30; [1959] 3 All E.R. 817; 228 L.T.Jo. 286.

CASES

Hochstrasser (*H.M. Inspector of Taxes*) v. *Mayes*

CASE

Stated by the Commissioners for the General Purposes of the Income Tax for the Division of Langbaurgh East in the County of York pursuant to Section 64 of the Income Tax Act, 1952, for the opinion of the High Court of Justice.

1. At a meeting of the said Commissioners held at Redcar in the said County of York on 16th May, 1956, Leonard Harry Mayes, of Marske-by-the-Sea in the said County of York, chemist (hereinafter called "the Respondent"), appealed against an assessment to Income Tax made on him under Schedule E of the Income Tax Act, 1952, for the year 1954–55 in the sum of £1,170 which included a sum of £350 paid or credited to him in the circumstances hereinafter referred to.

2. The sole question for our determination was whether the Respondent was assessable to Income Tax under Schedule E in respect of the said sum of £350 received by him from his employers, namely, Imperial Chemical Industries, Ltd. (hereinafter called "I.C.I."), under an agreement dated 1st June, 1951 (hereinafter called "the housing agreement"), and made between I.C.I. of the one part and the Respondent of the other part, a copy of which is attached hereto, marked "A"(1).

3. The Respondent and Mr. Lewis A. Inglis, asssitant head of the I.C.I. central staff department, gave evidence, and the following facts were proved or admitted:

(*a*) The Respondent is a married man and has two children, born in 1949 and 1953 respectively. The Respondent has been employed by I.C.I. since December, 1941, at which time he lived with his parents at Welwyn. His first appointment was as a laboratory assistant.

(*b*) The Respondent was transferred in September, 1950, from Welwyn to the I.C.I works at Hillhouse in the County of Lancaster on appointment as an assistant technical officer (chemist). During the first few months, which were a probationary period, the Respondent lived in rooms. On 27th April, 1951, the Respondent entered into a service agreement with I.C.I., a copy of which is attached hereto, marked "B"(1).

(*c*) The Respondent found trouble in purchasing a house owing to the limitations on price with which the Respondent had to comply in order to be eligible for assistance under the I.C.I. housing scheme.

(*d*) The Respondent was first informed of the said scheme at the time he was transferred to Hillhouse. A copy of a summary of the said scheme was produced and is attached hereto, marked "C"(1).

(*e*) In June, 1951, the Respondent purchased 16, Ribble Road, Fleetwood, in the said County of Lancaster, for the sum of £1,850. He was offered and accepted the housing agreement with respect to the said house. The purchase money for the said house was provided as set out hereunder.

	£	£
Purchase price		1,850
Provided by Respondent	90	
Borrowed on first mortgage from Abbey National Building Society	1,460	
Borrowed on second mortgage from I.C.I. ...	300	
	£1,850	£1,850

(1) Not included in the present print.

I.C.I. paid all legal costs, including stamp duties, and also paid the Respondent's removal expenses to Fleetwood. A copy of the second mortgage dated 1st June, 1951, to I.C.I. is attached hereto, marked "D"[1].

(*f*) In October, 1954, the Respondent was offered and accepted a transfer to Wilton works in the said County of York and thereupon offered his house for sale to I.C.I. under the housing agreement. I.C.I. declined to accept and the Respondent sold it, with their consent, for £1,500. The loss on sale, namely £350, was credited to the Respondent as follows:

	£	*s.*	*d.*		£	*s.*	*d.*
Sale Price	1,500	0	0	Repaid Abbey National Building Society ...	1,482	1	3
Loss on sale (i.e. difference between original purchase price and sale price) paid under housing agreement	350	0	0	Repaid to I.C.I. on second mortgage ...	300	0	0
				Retained by Respondent	67	18	9
	1,850	0	0		1,850	0	0

Again I.C.I. paid all legal costs and the Respondent's removal expenses to Wilton.

(*g*) I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company's action. The agreement cannot operate unless and until the house is sold for less money than it costs to buy. Under the housing agreement the employees cannot make a profit as a result of the housing agreement. An employee's salary is calculated quite independently of anything he might receive under the housing agreement. I.C.I. salaries compare favourably with salaries paid by other employers not operating a housing scheme.

4. It was contended on behalf of the Respondent:

(i) that any benefit received by the Respondent under the housing agreement was to meet a loss of capital and therefore not taxable;

(ii) that the Respondent did not receive any benefit in the nature of taxable money's worth under the housing agreement;

(iii) that if there was any benefit in the nature of taxable money's worth received by the Respondent it should have been assessed for 1950–51;

(iv) that if there was any taxable benefit received by the Respondent it was countervailed by an expense of a like amount incurred by him "wholly, exclusively and necessarily in the performance of the duties of his employment".

[1] Not included in the present print.

5. The following cases were referred to on behalf of the Respondent:

Stott v. *Hoddinott*, 7 T.C. 85.

Reed v. *Seymour*, 11 T.C. 625.

Wales v. *Tilley*, 25 T.C. 136.

Hunter v. *Dewhurst*, 16 T.C. 605.

Tennant v. *Smith*, 3 T.C. 158.

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

(*a*) that the sum of £350 paid or credited to the Respondent under the terms of the housing agreement represents a profit from his employment for which he is chargeable to Income Tax under the Income Tax Act, 1952, Section 156, Schedule E, and Ninth Schedule, Rule 1;

(*b*) that no deduction in respect of the said sum is allowable under Rule 7 of the said Ninth Schedule. Accordingly the assessment is rightly made and should be confirmed.

7. The following cases were referred to on behalf of the Inspector:

Herbert v. *McQuade*, 4 T.C. 489.

Fergusson v. *Noble*, 7 T.C. 176.

Hartland v. *Diggines*, 10 T.C. 247.

Corry v. *Robinson*, 18 T.C. 411.

Nicoll v. *Austin*, 19 T.C. 531.

Prendergast v. *Cameron*, 23 T.C. 122.

Bolam v. *Barlow*, 31 T.C. 136.

Nolder v. *Walters*, 15 T.C. 380.

8. We, the Commissioners, after hearing and considering the evidence are of the opinion that:

(*a*) the Respondent, under the terms of the service agreement dated 27th April, 1951, was bound to comply with the offer by I.C.I. of the position at Wilton works;

(*b*) the Respondent complied with the terms of the housing agreement dated 1st June, 1951, offering to sell the property to I.C.I. and, on their declining, with their permission selling for £1,500;

(*c*) the payment of £350 under the housing agreement was made against a total capital loss by the Respondent of £372 1*s*. 3*d*. incurred as a result of his move under the service agreement;

(*d*) the payment, being to meet a capital loss, was not assessable to Income Tax;

(*e*) that we the Commissioners are of the unanimous opinion that the payment of £350 by I.C.I. to the Respondent is to meet loss in fulfilling the obligations of his employment and is therefore not assessable to Income Tax.

9. Immediately after the determination of the appeal dissatisfaction therewith as being erroneous in point of law was declared to us on behalf of H.M. Inspector of Taxes and in due course we were required to state

a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

Gerald D. Cochrane,
T. S. Petch,
L. Petch,
Herbert Brown,
D. H. Chapman,
John T. Allison,
R. Simons,
H. G. W. Debenham,

Commissioners for the General Purposes of the Income Tax for the Division of Langbaurgh East in the County of York.

Jennings v. *Kinder* (*H.M. Inspector of Taxes*)

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the General Purposes of the Income Tax for the Division of Stockton Ward in the County of Durham for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the said Division held at Stockton-on-Tees on Thursday 17th May, 1956, for the purpose of hearing appeals against assessments under the Income Tax Acts, Charles Maurice Jennings, of 15, Fieldfare Lane, Norton, Stockton-on-Tees (hereinafter called "the Appellant"), appealed against the additional assessment in the sum of £450 made upon him under Schedule E for 1953–54.

2. The following facts were admitted before us :

(*a*) The Appellant joined the service of Imperial Chemical Industries, Ltd. (hereinafter called "I.C.I."), in July, 1944, at which time he lived in London. The Appellant was first employed in the head office treasurer's department in London as an accountant.

(*b*) In January, 1949, the Appellant was offered and accepted a transfer to Wilton Works in the County of York as assistant chief accountant. The Appellant accordingly moved his home to the Wilton district and bought a house, 7 Rifts Avenue, Saltburn, in March, 1949. On this transfer he was offered and accepted the housing agreement under the terms of I.C.I.'s housing scheme III against loss on sale. This house (after minor improvement costs had been added) cost in all £2,480.

(*c*) In April, 1952, the Appellant was selected to fill the post of joint senior assistant to the cost controller in the head office treasurer's department of I.C.I. in London, and he was offered and accepted this post. By agreement with I.C.I. he sold his house, 7 Rifts Avenue, Saltburn, for £2,400 and I.C.I. made good to him under the terms of the housing agreement the loss of £80.

(*d*) In May, 1952, after transfer to London, the Appellant bought a house, "Abinger", Bushey Way, Park Langley, Kent (hereinafter called "Abinger"), for £4,650 and was offered and accepted a housing agreement under scheme III in regard to that house.

(*e*) The purchase of "Abinger" was financed in 1952 as follows:

	£	£
Purchase price		4,650
Cash provided by Appellant	1,750	
Borrowed on first charge from Pension Fund Securities, Ltd. (an investment corporation acting as trustee for certain pension schemes of I.C.I.)	2,300	
Borrowed on second charge from I.C.I. ...	600	
	4,650	4,650

I.C.I. paid the legal costs, including stamp duties. I.C.I. also paid the Appellant's removal expenses to Park Langley.

(*f*) In November, 1952, the Appellant was appointed assistant accountant in the head office treasurer's department in London, but this involved no change in locality of work.

(*g*) In June, 1953, the Appellant was offered and accepted the post of deputy chief accountant of the Billingham division of I.C.I., Co. Durham. On transfer he offered "Abinger" to I.C.I. under the housing agreement, but I.C.I. declined to buy it and he sold it, with I.C.I.'s consent, for £4,200. It had cost £4,650 and the loss on sale, viz. £450, due to be made good to the Appellant under the housing agreement was credited to him as follows:

	£ s. d.	£ s. d.	£ s. d.
Sale price			4,200 0 0
Repaid first charge, balance due		2,152 15 0	
Repaid to I.C.I. on second charge	600 0 0		
Less credit given for loss on sale under housing agreement	450 0 0		
		150 0 0	
Balance due to Appellant ...		1,897 5 0	
		4,200 0 0	4,200 0 0

I.C.I. again paid the legal costs and the Appellant's removal expenses to Billingham. At the time of his transfer to Billingham the Appellant was handed a summary of scheme III.

3. The following documents put in evidence before us are hereto annexed(1), marked respectively as under, and form part of this Case, namely:

"A" Copy agreement for service dated 2nd May, 1952, and made between I.C.I. of the one part and the Appellant of the other part.

"B" Copy legal charge dated 22nd May, 1952, and made between the Appellant of the one part and Pension Fund Securities, Ltd., of the second part.

"C" Copy legal charge dated 22nd May, 1952, and made between the Appellant of the one part and I.C.I. of the other part.

(1) Not included in the present print.

"D" Summary of revised I.C.I. housing scheme (scheme III).

"E" Copy of housing agreement dated 22nd May, 1952, and made between I.C.I. of the one part and the Appellant of the other part.

4. The Appellant gave evidence before us, which we accepted, as follows. When he joined I.C.I. in 1944 he had no knowledge of any form of housing scheme and was not motivated by the prospect of any housing scheme as of course he had no knowledge of anything of the sort. If there had never been any housing scheme he would still be in the employment of I.C.I. He considered his remuneration as adequate for the work he did. "Abinger" was a four-bedroomed house with about ¼ acre of garden. In May, 1952, he had two small daughters, aged 3 years and a few months respectively. He had had a number of changes in residence in the course of his service with I.C.I., which was inconvenient to him and his family. He had never bought a house with a view to the sale of it and did not regard the £450 credited to him on his sale of "Abinger" as income. He did not regard the house as an investment, although once he had bought it he considered it to be part of his capital assets. The date on which he made a loss on the sale of "Abinger" was about August, 1953.

5. Mr. Lewis Alexander Inglis, who is the assistant head of the central staff department of I.C.I., also gave evidence before us, which we accepted, as follows. He directed the policy of the company for some 3,000 employees in the higher grades. He emphasised how essential it was that I.C.I. should be able to move their employees from one part of the country to another. Although an employee was quite prepared to go to any financial lengths to get his family settled in a new house on transfer, the employee's chief worry was the loss he might make if he had to sell his house on re-transfer. If an employee had the worry of a possible financial loss on the sale of his house removed as a result of I.C.I.'s housing scheme he was much more likely to be a more satisfactory employee to the company.

An employee's salary is calculated quite independently of anything he might receive under the housing scheme. He agreed that the scheme did help to make a good staff policy and a good personnel policy. The existence of the scheme kept the married man in a happier and more settled frame of mind. He thought it was extremely unlikely that it might influence such men to remain with I.C.I. It was not compulsory for a married employee to have an interest-free loan from the company when he bought a house, and though it was conceivable that a man would not apply for an interest-free loan he could not think of any instance of that having happened. If an employee in the scheme had not received an interest-free loan and then sold his house at a loss I.C.I. would make up the loss wholly in cash. If the amount of the interest-free loan is less than the amount lost then one amount is set against the other and the balance is paid in cash. He did not agree that there could be any profit to the employee in the scheme. He agreed that there was no restriction on what an employee could do with any amount he received under the scheme. He could, for instance, use it to go for a holiday or could spend it as he wished. He did, however, regard it as merely putting an employee back in the position from which he started. When asked whether it was fair to sum up the whole scheme by saying that I.C.I. as an employer saved the employee the sum of money he would otherwise

lose, he did not entirely agree and said that such an employee only had to buy a house because the company had moved him and his loss, therefore, was only incurred because of his transfer. He would be out of pocket if there was no such scheme and as a result of the scheme he was not out of pocket. The £450 was not salary for services under the service agreement.

6. It was contended on behalf of the Appellant:

(i) that the £450 was received by the Appellant to meet a loss of capital and was not taxable;

(ii) that any benefit under the housing agreement conferred upon the Appellant was not money's worth and therefore was not taxable;

(iii) that any benefit arising under the housing agreement was not a reward for services and was not taxable;

(iv) that if any benefit under the housing scheme was a taxable emolument of the Appellant, the like amount was wholly, exclusively and necessarily expended by him in the performance of the duties of his employment and that therefore no taxable profit emerged.

The following cases were cited to us in support of the Appellant's contentions, namely:

Stott v. *Hoddinott*, 7 T.C. 85.

Reed v. *Seymour*, 11 T.C. 625.

Hunter v. *Dewhurst*, 16 T.C. 605.

7. It was contended on behalf of the Respondent:

(*a*) that the sum of £450 paid or credited to the Appellant under the housing scheme represented a profit or emolument from his employment of an income nature for which he was chargeable to Income Tax under the Income Tax Act, 1952, Section 156, Schedule E, and Ninth Schedule, Rules 1 and 4;

(*b*) alternatively, that the Appellant was chargeable to Income Tax under Schedule E in respect of the £450 by virtue of Section 160, Income Tax Act, 1952;

(*c*) that if tax was chargeable under either of the above contentions no reduction in respect of the £450 was allowable under Rule 7 of the said Ninth Schedule in that any expense incurred by the Appellant in selling his house was not incurred wholly exclusively and necessarily in performing the duties of his employment;

(*d*) that the assessment was rightly made and should be confirmed by us.

The following cases were cited to us in support of the Respondent's contentions, namely:

In re *Harmony & Montague Tin & Copper Mining Co.* (Spargo's Case) (1873), 8 Ch. App. 407.

Herbert v. *McQuade*, 4 T.C. 489.

Fergusson v. *Noble*, 7 T.C. 176.

Hartland v. *Diggines*, 10 T.C. 247.

Nicoll v. *Austin*, 19 T.C. 531.

Corry v. *Robinson*, 18 T.C. 411.

Prendergast v. *Cameron*, 23 T.C. 122.

8. We, the Commissioners who heard the appeal, having considered the admitted facts, the documents put in evidence before us, the evidence of the Appellant and of Lewis Alexander Inglis, the arguments made before us and cases cited to us, were of the opinion that the sum of £450 allowed to the Appellant under the housing scheme was a profit or emolument from his employment within the meaning of Rules 1 and 4 of the Ninth Schedule, Income Tax Act, 1952, in respect of which an additional assessment was properly made upon him for the year 1953–54.

We were also of the opinion that the loss on the sale of "Abinger" was not money wholly, exclusively and necessarily expended in the performance of the duties of the office or employment of the Appellant within the meaning of Rule 7 of the said Ninth Schedule.

We accordingly confirmed the additional assessment.

9. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64 (2), which Case we have stated and do sign accordingly.

The question of law for the opinion of the Court is as to whether our decision as set out in paragraph 8 is erroneous in point of law.

J. Claxton Hudson,
John Spark,
Richard T. Pickersgill,
C. E. M. Robinson,
} Commissioners for the General Purposes of the Income Tax for the Division of Stockton-on-Tees Ward in the County of Durham.

3rd March, 1957.

The cases came before Upjohn, J., in the Chancery Division on 18th, 19th and 20th December, 1957, when judgment was given against the Crown, with costs.

Mr. J. Pennycuick, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown; and Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe for the taxpayers.

Upjohn, J.—I have before me two appeals by way of Case Stated from the General Commissioners of Income Tax, one by the Crown and one by the subject. Both raise precisely the same point, and they are in their essential facts indistinguishable one from the other save that in Jennings's case an additional point arises on Section 160 of the Income Tax Act, 1952.

The appeals raise, to my mind, novel and important points. In Mayes's case the Commissioners for a Division of York decided in favour of the subject, and in Jennings's case on the very next day the Commissioners for a Division of Durham decided in favour of the Crown. I propose to take Mayes's case first, as upon its facts it is the simpler.

Mayes has been employed by Imperial Chemical Industries, Ltd., since 1941. He started, plainly, in a fairly junior capacity. In the Case reference is made to a written agreement of employment dated 27th April, 1951. As will be seen from what follows, that date gives rise to certain difficulties,

(Upjohn, J.)

but it has this morning been agreed that the Crown will accept the statement made by Mr. Bucher, for the Respondent Mayes, upon instructions, that although that was his first written agreement he was employed under earlier oral contracts, and one of the terms of those contracts was that he was obliged to move to such of his employers' factories or offices as they should from time to time direct. Pursuant to that obligation, Mayes was transferred in September, 1950, from Welwyn, where he was then working, to the Imperial Chemical Industries works at Hillhouse in the County of Lancaster. He went there as an assistant technical officer. He found a good deal of trouble in purchasing a house, and he was then for the first time informed of his employers' housing scheme, and to that housing scheme I must now refer.

It is exhibit C in Mayes's Case. I do not propose to read it all, because it is rather a long document, but it is headed

> "Housing: Scheme of Assistance to Transferred Married Male Staff (including Foremen)",

and it states that the company is prepared to offer its employees assistance in the purchase of a house, provided the price was within certain limits. It is stated that the company is prepared to make an interest-free loan to an amount which varied in relation to gross I.C.I. emoluments. Then they set out the terms of the interest-free loan. It is to be secured by a mortgage of the house, and where there was a first mortgage by a building society or a private lender the interest-free loan would be secured by a second mortgage. Where the employee financed the purchase, of course, it would be a first mortgage. Then in paragraph 2 the memorandum sets out that

> "It is not the present intention of the Company to require the Interest-free Loan to be repaid until the expiration of 15 years"

or the earlier of the following events: transfer by the company to a new locality so that the employee ceased to reside in the house, or giving up possession of the whole or any part of the house, or retiring from the service on pension, or leaving the company's employment, or death. The memorandum then continues:

> "Subject to your maintaining the house in good repair, the Company will guarantee you against loss on depreciation of the house on the following terms: 1 (*a*) The Company will pay you the amount of any loss due to depreciation in the value of the house on the happening of any of the following events, namely:—(i) If you are subsequently transferred by the Company and you wish to sell or let the house. (ii) If you die whilst in the service of the Company. (iii) If you retire on pension. (*b*) In the event of your being transferred by the Company, and by reason of such transfer you wish to sell or let the house, you will offer the house to the Company who will have the right to buy it at a valuation price. If the house is purchased by the Company and the valuation price is less than the original cost price plus improvement costs, the difference is made up by the Company under the guarantee. If the house is not purchased by the Company, the provisions of the two following sub-clauses (*c*) and (*d*) will apply. (*c*) If the house is sold within one year after such one of the three events mentioned in (*a*) above as shall first happen and the sale is a bona fide sale at the best price reasonably obtainable and is not for the purpose of a speculation, the Company will pay you or your executors or administrators, in the case of your death, the amount (if any) by which the sale price is less than the original cost price, together with improvement costs. (*d*) If the house is not sold within that one year, a valuation is made at the end of that year and if the valuation price is less than the original cost price, plus any improvement costs, the Company will pay the difference."

Then clause 2 deals with the case where the employee may desire to sell his house for his own good reasons, although none of these events of transfer, death or retirement happened, and in that case it was provided that if good and sufficient reasons were given for the sale the company would consent to the sale, and if there was a loss the company would pay the loss. Then there is further provision about improvements, costs and so on, which I need not set out.

So, very briefly, the effect of this scheme, if you entered into it, was that you purchased a house with or without the assistance of an interest-free loan according to your desires. The company, in the events I have mentioned, would guarantee you against loss: that is to say, if there was a transfer to another place you had to offer the house to the company, who might buy it. If they did not buy it, if the house was sold within a year and there was a loss, the company paid you the amount of the loss. If there was no sale, then at the end of the year there was a valuation, and the company would pay you the amount of the loss as estimated by the valuation. That was how the scheme worked. It was, of course, purely optional whether the employee entered into it or not.

In 1950 the Respondent, as is found in the Case, first heard of the scheme, and he decided to enter into it. Accordingly, he signed the housing agreement on 1st June, 1951. That is a lengthy and carefully drawn agreement which carries out in great detail the general scheme which I have already outlined. I do not think that it is necessary for my purpose to refer in detail to it. It is annexed to the Case Stated in any event.

Having entered into it, he purchased a house, 16, Ribble Road, Fleetwood, for the sum of £1,850. He financed that by a first mortgage from the Abbey National Building Society and by an interest-free loan of £300, and he provided £90 of the purchase money himself. So time passed, and in October, 1954, he was transferred to the Wilton works in the County of York, and he was of course anxious to sell his house. So in pursuance of the housing agreement he offered his house to Imperial Chemical Industries, but they declined to accept it, and so he sold the house, with his employers' consent, for £1,500, and the loss on the sale was therefore £350. In fact (although nothing, I think, turns upon it) the loss was a little greater, because I suppose, as he was paying off the Abbey National Building Society prematurely, he had to pay them some £22 1*s.* 3*d.* more than he had received from them. But that loss he had to bear himself. But the main loss (that is, the difference between £1,500 and £1,850) was paid to him in due course by Imperial Chemical Industries, and it is that sum upon which he has been assessed. Imperial Chemical Industries in fact paid all the legal costs and the removal expenses, but nothing turns on that.

The Commissioners found as a fact that the terms of his employment were completely independent of this housing agreement. They say this:

> "An employee's salary is calculated quite independently of anything he might receive under the housing agreement. I.C.I. salaries compare favourably with salaries paid by other employers not operating a housing scheme."

Of course, no one doubts that the scheme was introduced to benefit both employer and employee. The scheme was introduced in 1948, when housing conditions were more difficult even than they are now, and it is quite clear from the evidence that was given before the Commissioners and from their findings that the principal object of introducing this scheme was so that the

employee should be free from worry on transfer. He knew that, if he was transferred away, if he liked he could go into the scheme and he could be guaranteed against loss. The advantage to Imperial Chemical Industries was twofold. They had more contented employees, and, of course, they also had the call on the house when the employee left it on transfer or death, and that might be quite valuable, because they could then offer the house to the person coming in to take the place of the employee who was transferred, and they could offer him accommodation which might otherwise be difficult to get.

The assessment is made upon the Respondent Mayes under Schedule E, and I must briefly turn to the relevant Section. The charging Section is Section 156 of the Income Tax Act, 1952, and I read it as it was at the relevant time before it was amended in 1956:

> "The Schedule referred to in this Act as Schedule E is as follows . . . 2. Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule."

It is not disputed that the tax is charged upon the Respondent under that Paragraph. I now turn to the Rules which by Paragraph 5 of Schedule E in Section 156 are applicable to tax charged under that Schedule, and I think I need only read the first Rule:

> "Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect"

—now these are the important words—

> "in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

Now, it is this loss of £350 payable which the Crown seek to tax as being a salary, fee, wage, perquisite or profit arising "therefrom" for the year of assessment. As I have said, in Mayes's case they failed. In Jennings's case they succeeded.

The argument on behalf of the subject is this. He says that his payment of £350 does not arise from his office or his employment because it is not a profit; it is not in any sense a reward for services, and therefore he says it is not a profit that arises therefrom, that is to say, from the employment. A profit or perquisite, it is submitted, must essentially arise as a reward for services, whether past, present or future.

The Crown, on the other hand, offer a dichotomy. It is submitted that if you leave out transactions for full value between employer and employee, the consideration being something other than services (for example, the purchase for full value in money or money's worth of an employee's house or a motor car), you find upon the authorities that every payment by an employer to an employee must either be a personal gift, that is, a gift to an employee on grounds personal to him and not to him *qua* employee, when admittedly it is not taxable, or a payment to him as an employee and because he fulfils some office or employment, in which case it is a profit from the office or employment and is taxable. Mr. Pennycuick says that, putting it

the other way round and leaving out of account transactions for full consideration in money's worth, every payment to the employee is a profit from his office and taxable unless personal to him, and it is said that all the authorities show that.

With all respect to the argument of the Crown, I do not think they show any such easy dichotomy. In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in 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. I venture to think that the Crown's argument is based on a misinterpretation of some of the authorities, and for this reason, that in so many cases on this much litigated branch of the law, such, for instance, as the Clergy Sustentation Fund case(1), the Easter offerings case(2), the cricketers' benefit cases(3), and so on, it was clear from the very nature of the payment that it was in respect of services, and the whole question was whether it was a profit from the employment or a personal present, and the possibility of its being a payment not in connection with services simply did not arise. For that reason, the point which is in the forefront of this case frequently did not rise to the surface in many of the well-known cases.

Having expressed my view on the law, I turn to the authorities which seem to me to justify that view. The first is *Hunter* v. *Dewhurst,* 16 T.C. 605. That is a difficult case which has been the subject of subsequent judicial comment. I read the part of the headnote relating to *Dewhurst's* case:

> "the Respondent desired to retire from active management of the company, but his co-directors wished to be able still to consult him, and it was agreed that he should resign the office of Chairman, receive as 'compensation' a lump sum in lieu of the provision under article 109, waiving any future claim under that article, and remain on the board . . . at a reduced rate of remuneration."

It was held in the House of Lords that in the circumstances of that case the sum received was not assessable to Income Tax. Lord Atkin, at page 644, said this:

> "This sum is expressed in the article to be 'by way of compensation for the loss of office.' I will assume, without expressing any opinion on the matter, that this sum, if received by any ex-director, would fall within the words 'salary or profit whatsoever' and would come 'from' the office of director, as being part of the remuneration which he was entitled to under his contract of employment. But the circumstances in which the first payment was made seem to me to negative the proposition that the payment was received 'from' the office. Rule 1 appears to me to indicate emoluments either received from the employer or from some third party (such as tips, permitted commission and the like) as a reward for services rendered in the course of the employment."

That is, I think, a helpful expression of opinion upon the general scope of Rule 1.

The next case is *Prendergast* v. *Cameron,* 23 T.C. 122. In that case a director received the sum of £45,000 in consideration of which he did not

(1) Herbert *v.* McQuade, 4 T.C. 489. (2) Cooper *v.* Blakiston, 5 T.C. 347.
(3) Reed *v.* Seymour, 11 T.C. 625; Moorhouse *v.* Dooland, 36 T.C. 1.

(Upjohn, J.)

resign from his office of director, and it was held that that sum was properly assessable as a profit arising from the office of director under Schedule E. Lord Maugham said this, at page 146:

> "On these facts and findings, the question is whether the £45,000 was paid to the Appellant in his capacity as a director and to induce him to continue to hold his office of a director, so that the sum comes within the charging words of Rule 1 of Schedule E, 'all salaries, fees, wages, perquisites or profits whatsoever therefrom' (that is, from the office of a director), or whether the sum was paid merely to obtain his agreement not to serve the notice for, say, one day, leaving him perfectly free to retire on the next day, in which case the sum, as the Master of the Rolls held, would not be a profit arising from the office."

So Lord Maugham is there quite clearly saying that a payment might have been made to him in connection with his office of director which might well not fall in the category of a profit from his office at all.

The next case is *Beak* v. *Robson*, 25 T.C. 33. In that case the respondent director covenanted in consideration of the payment of £7,000 that he would not compete with the company, when his employment had come to an end, within a radius of 50 miles, and it was held on an assessment under Schedule E for £7,000 that it was a payment for giving up a right wholly unconnected with his office and operative only after he ceased to hold that office, and the assessment was discharged. Lord Simon, L.C., said this, at pages 41–2:

> "The consideration which he has to give under the covenant is to be given not during the period of his employment, but after its termination. He is giving to the company for a sum of £7,000 the benefit of a covenant which will only come into effect when the service is concluded. I agree with the Court of Appeal in the view that to treat this £7,000 as a profit arising from the Respondent's office is to ignore the real nature of the transaction. It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received £7,000. But that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under Schedule E."

Lord Simon there quite plainly is saying that you must look at the facts of every case, and it is not every payment that is made to a director which accrues to him as a profit from his office. That actual decision is no longer the law, because the law has been altered by Statute, but that does not affect the value of Lord Simon's statement.

The next case is *Wales* v. *Tilley*, 25 T.C. 136, where a director was assessed under Schedule E in the sum of £40,000. Part of that was to commute his salary and part was capitalisation of a pension. In the House of Lords it was held, as appears from the headnote,

> "that so much of each payment of £20,000 in the years 1938–39 and 1939–40 as represented a sum paid in compromise of reduction of salary was assessable to Income Tax under Schedule E (*Prendergast* v. *Cameron*, 23 T.C. 122, followed), but so much as represented capitalisation of pension was not so assessable (*Hunter* v. *Dewhurst*, 16 T.C. 605, followed). The case was remitted to the Special Commissioners to apportion the two payments accordingly."

That again, is another example of a payment to a director part of which was a profit from his office and part of which was not.

The next case is *Moorhouse* v. *Dooland*, 36 T.C. 1. That was the case of the cricketer's benefit. I only desire to refer to the judgment of Jenkins, L.J., at page 23. He said this:

> "I hope I will not be thought to undervalue these arguments if I say that I regard them as disposed of by the application of the principle that the question whether a given receipt is a profit of an employment must be decided from the standpoint of the recipient."

(Upjohn, J.)

Then, finally, there is the recent case of *Bridges* v. *Hewitt,* [1957] 1 W.L.R. 674 (37 T.C. 289). In that case certain shares were transferred to the directors in consideration of their serving the company for four years thereafter. There was a difference of opinion, and Jenkins, L.J., delivered a dissenting judgment agreeing with the judgment of Danckwerts, J., in the Court below. But nevertheless he made a helpful review of the cases, at page 682(1). The first was *Herbert* v. *McQuade* (4 T.C. 489), the Clergy Sustentation Fund case, and the second was *Cooper* v. *Blakiston* (5 T.C. 347), the Easter offerings case. I do not propose to read the passages which he read, but there is no doubt that reading those passages alone affords some support to the view of the Crown that the moment you find a payment is made to a man *qua* employee then automatically, apparently, it follows that it is a profit of his employment. But the reason, I venture to think, is one that I have already given, namely, that in those cases and, indeed, in the case next referred to in the judgment of Jenkins, L.J., *Reed* v. *Seymour* (11 T.C. 625), there were only two possible alternatives: either it was a profit from the employment or it was a personal present.

In *Reed* v. *Seymour* Lord Cave, L.C., said this(2) (I am quoting from Jenkins, L.J.'s judgment(3)):

> "These words and the corresponding expressions contained in the earlier Statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as Mr. Justice Rowlatt put it(4), 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not."

Then in *Bridges* v. *Hewitt,* [1957] 1 W.L.R., at page 698(5), Morris, L.J., said this:

> "In my judgment the shares were not a profit from the office of managing director because they were not received by way of remuneration for services rendered as managing director. They were received while Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director."

Now follows, I venture to think, what is an extremely important summary of the law, a little later on that page:

> "Accordingly, the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office."

That, I respectfully believe, is the true test. Sellers, L.J., at page 701(6), said this:

> "In this way the transfer of the shares is 'linked up' with the respective offices, but the question is whether that necessarily or on a reasonable view involves that the transfer was a payment of remuneration for services rendered to the company or a profit of the employment. I would not regard the transfer as having those attributes or of such a character."

(1) 37 T.C., at pp. 310 *et seq.* (2) 11 T.C., at p. 646. (3) 37 T.C., at p. 311. (4) 11 T.C., at p. 630. (5) 37 T.C., at p. 324. (6) *Ibid.*, at p. 326.

(Upjohn, J.)

I now relate the law as I have endeavoured to state it to the facts. The housing agreement formed no part of the employee's remuneration, nor did any payment made thereunder. It formed no part of his contract of service, nor was it an inducement held out to him to enter into the company's employment, for he did not know of it until he had been employed for quite a long time. Of course, the housing agreement into which he entered—he need not, of course, if he did not want to—was an advantage to him, and so it was to his employers, for the reasons I have mentioned earlier. The matter must, as Jenkins, L.J., said in *Moorhouse* v. *Dooland*(1), be regarded from the point of view of the employee. Save in the most general sense it does not seem to me accurate to say that to enter into the housing agreement or to receive a payment thereunder was a profit arising from his office. Of course, in a general sense it was connected with his office, because if he had not been employed he would not have entered into it. It was offered to him, I entirely agree, in his character as an employee and not because of any characteristic personal to himself, and in that sense again it did accrue to him because he was employed. In another sense also it was connected with his employment in this way, that he entered into it because he knew that he might be transferred, and in that case he would be guaranteed against loss when he wanted to sell his house on transfer. But, as Lord Simon, L.C., pointed out in *Beak* v. *Robson*(2), those considerations are not really conclusive of the matter at all. You must find, looking at the true nature of the transaction, whether it was a profit arising from his office. In my judgment, as I have said, it was not. It was in no true sense a reward for his services. It was an advantage to him but not in my judgment a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers.

That is fatal to the Crown's claim, and I do not propose to examine the alternative claims advanced on behalf of Mayes upon the footing that the payment does arise from the office of employment, for the simple reason that in this very technical branch of the law it is too difficult and artificial to apply the law to a payment in respect of which I at any rate am prepared to deny the major premise as to its character. Accordingly, the Crown's appeal in Mayes's case must be dismissed, with costs.

I turn to Jennings's case. In that case, as I have said, the Crown succeeded. But it is admittedly indistinguishable except for the application of Section 160 of the Income Tax Act, 1952. That arises in Jennings's case for this reason, that he was an employee in an altogether higher grade than Mayes and he was at the relevant time receiving emoluments in excess of £2,000 a year. That is a condition necessary to bring Section 160 into operation, and I shall now read Sub-section (1):

> "Subject to the provisions of this Chapter, any sum paid in respect of expenses by a body corporate to any of its directors or to any person employed by it in an employment to which this Chapter applies shall, if not otherwise chargeable to income tax as income of that director or employee, be treated for the purposes of paragraph 1 of the Ninth Schedule to this Act as a perquisite of the office or employment of that director or employee and included in the emoluments thereof assessable to income tax accordingly: Provided that nothing in this subsection shall prevent a claim for a deduction being made under paragraph 7 of the said Ninth Schedule in respect of any money expended wholly, exclusively and necessarily in performing the duties of the office or employment."

(1) 36 T.C. 1, at p. 22. (2) 25 T.C. 33, at p. 41.

(Upjohn, J.)

Now, the whole question, therefore, is whether that applies to this sum—I think in the case of Jennings it was £450—paid to him by his employers. The Chapter is headed " Expenses Allowances to Directors and Others ", and I approach this Section with the view that " expenses " there is referring to the ordinary expenses that directors and employees incur and not to a payment such as this. Of course, that is not conclusive of the matter. First of all you have to find a sum paid in respect of expenses to an employee. £450 has been paid. But is it in respect of expenses? To what expense has the employee been put? That is plainly what the Section contemplates. The answer is, in the year of assessment he has not been put to any expense at all. Unfortunately for him, he received rather less for the sale of a house than he had hoped, but he has not been put to any expense. He merely made a loss on the sale of his house, and that cannot in any ordinary use of language be described as an expense, I would have thought, for the purposes at all events of Section 160. The only expense to which the employee was put was when he purchased the house some years before in another year of assessment, and all that has happened is that he has not received as much as he paid for it. It does not seem to me that that payment has the character of an expense for the purposes of Section 160 at all. Accordingly, in Jennings's case I must allow the appeal and discharge the assessment, and the Crown must pay the Appellant's costs.

The Crown having appealed against the above decisions, the cases came before the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.) on 9th, 10th and 11th June, 1958, when judgment was reserved. On 7th July, 1958 (Parker, L.J. dissenting), judgment was given against the Crown, with costs.

Mr. J. Pennycuick, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown; and Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe for the taxpayers.

Jenkins, L.J.—I have felt considerable difficulty over these two cases, but with some hesitation I have come to the conclusion that the appeals should be dismissed.

I need not repeat the facts at length. The housing scheme established by I.C.I. was designed to assist married male members of the staff of I.C.I. to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another in the course of their employment by I.C.I. The assistance provided consisted, in effect, of a contribution by I.C.I. towards the cost of the house in the form of an interest-free loan and a guarantee by I.C.I. indemnifying the employee concerned against loss through depreciation in the value of the house. No question arises in regard to the interest-free loan. As regards the guarantee, admission to the scheme was to be effected by means of a standard form of housing agreement to be entered into between I.C.I. and the employee concerned, setting out in considerable detail the terms on which and circumstances in which the guarantee was to operate.

The Respondent employees in these two appeals both bought houses on being transferred to new places of work, and pursuant to the scheme both

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duly entered into housing agreements with I.C.I. Both were later again transferred and sold their houses in consequence. The house in each case realised less on such sale than the employee had paid for it, and under their guarantee I.C.I. paid or allowed in account to the employee the appropriate sum in respect of such loss. The sole question in each of the two appeals is whether the sum so paid or allowed by I.C.I. to the Respondent employee was a profit of his employment and accordingly chargeable to Income Tax under Schedule E. The charge to tax under this Schedule is now contained in Section 156 of the Income Tax Act, 1952, which provides:

> "The Schedule referred to in this Act as Schedule E is as follows . . . 1. Tax under this Schedule shall be charged in respect of every public office or employment of profit . . ."

and so on. Then Paragraph 2, which is the material Paragraph for the purposes of the present case, provides:

> "Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule."

Then Paragraph 5 provides:

> "The provisions set out in the Ninth Schedule to this Act shall apply in relation to the tax to be charged under this Schedule."

Turning to the Ninth Schedule, one finds Paragraph 1 in the following terms:

> "Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

I think those are all the statutory provisions to which I need at the moment refer.

The objects with which I.C.I. established the housing scheme are thus described in paragraph 3 (*g*) of the Case Stated with respect to Mr. Mayes:

> "3 (*g*) I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company's action."

The Case Stated with respect to Mr. Jennings contains in paragraph 5 a description of I.C.I.'s objects which though couched in different language is substantially to the same effect.

The housing agreements entered into by I.C.I. with Mr. Mayes and Mr. Jennings respectively are attached to the two Cases, and I need not recite them in full. They are in the standard form used by I.C.I. for the purposes of their housing scheme, and their salient features for the purposes of the two appeals may be thus summarised: (i) In the event of the employee being transferred to a new place of employment in the service of I.C.I. and consequently desiring to sell or let the house, the employee must offer to sell the

house to I.C.I. If I.C.I. accepts, then the house is to be bought by I.C.I. at the current market value ascertained by valuation ; and if such value is less than the employee's expenditure on the house I.C.I. becomes liable to pay the difference to the employee. If I.C.I. declines, then the employee is at liberty to sell to a third party and I.C.I. becomes liable to pay the employee the amount, if any, whereby the price realised falls short of his expenditure on the house. (See clause 2 of the agreements.) (ii) In the event of the sale of the house by the employee or his personal representatives within 12 months after (*a*) the refusal by I.C.I. of an offer made on transfer under (i) above, or (*b*) the retirement of the employee, or (*c*) the death of the employee, whichever first happens, I.C.I. becomes liable to pay to the employee or his personal representatives the amount, if any, whereby the price realised on such sale falls short of the employee's expenditure on the house. (See clause 3 (1).) (iii) If the house is not sold before the expiration of the period of 12 months mentioned in (ii) above, then there is to be a valuation of the house, and I.C.I. becomes liable to pay to the employee or his personal representatives the amount, if any, whereby the employee's expenditure on the house exceeds the amount of the valuation. (See clause 3 (2).) (iv) If, at any time before such one of the three events mentioned in (ii) above as shall first happen, the employee while still in the service of I.C.I. desires to sell the house he may do so, but in that case he is only to be entitled to the benefit of I.C.I.'s guarantee against capital loss if he obtains I.C.I.'s consent to the sale and offers to sell the house to I.C.I. If I.C.I. accepts the offer then the house is to be bought by I.C.I. on similar terms to those stated in (i) above (i.e., with the benefit of the guarantee). If I.C.I. declines the offer then the employee may sell to whom he pleases, and I.C.I.'s guarantee is to apply to any resulting capital loss. (See clause 4.) The agreement is to continue in force for a period expiring 12 calendar months after the death of the employee, but subject to fulfilment of accrued rights it ceases automatically upon such one of the following events as shall first happen, that is to say, if the employee shall: (*a*) be transferred for service with I.C.I. elsewhere and offers to sell the house to I.C.I. ; (*b*) retire from the service of I.C.I. on pension ; (*c*) cease to be employed by I.C.I. for any other reason ; (*d*) sell or let the property or any part thereof ; (*e*) cease to use the house as a permanent residence. (See clause 11.) It is a condition precedent to I.C.I. affording to the employee a guarantee against any capital loss he may suffer that the employee shall at all times keep the house in good tenantable repair. (See clause 6.)

Such being the nature of the housing agreement, were the payments made by I.C.I. to Mr. Mayes and Mr. Jennings respectively pursuant to the guarantee upon their respectively being transferred and selling their houses for less than they had paid for them, after first duly offering them to I.C.I., profits of their employment with I.C.I.? We were referred to most of the many authorities in which payments received by holders of offices or employments in an infinite variety of circumstances have been held to be or not to be profits of the office or employment for tax purposes. I do not propose to go into them at length. The general principles to be applied are well settled. The difficulty is to apply them to the facts of particular cases. I am content to accept Mr. Pennycuick's broad proposition that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee and for no consideration moving from the employee other than the services which he renders. I would, however, qualify that broad proposition by saying that it is not to be taken as extending to " testimonials " of the kind considered by the House of Lords in

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Reed v. *Seymour,* 11 T.C. 625, and also that there may be benefits casually bestowed by an employer on an employee such as birthday, Christmas or wedding presents, or given on compassionate grounds referable to relationship, friendship, social custom or motives of charity, which though made for no consideration in the legal sense should not be treated as referable to services or as made to the employee in that capacity. But no exception of that kind arises here. I am also content to accept the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment albeit made during the continuance of the employment.

The decisive question in each of these two cases therefore is, as I see it, simply whether the payment made by I.C.I. to the employee pursuant to the guarantee is a payment made to the employee in that capacity and for no consideration other than services, in which case it is taxable as a profit of his employment; or was such payment made for a consideration other than services, in which case it is not so taxable. I think it may truly be said that the housing agreement in each case was entered into by I.C.I. with the employee in his capacity as employee, in the sense that it was by virtue of his being an employee of I.C.I. that he was given the opportunity of participating in the housing scheme and for that purpose of entering into the housing agreement with I.C.I. But it does not necessarily follow that the employee, having entered into the housing agreement and thereafter receiving a payment from I.C.I. under the guarantee, must be taken to have received that sum in his capacity as employee and for no consideration other than services. The employee was enabled to enter into the housing agreement by virtue of the fact that he was an employee of I.C.I. But any payment he might receive under the housing agreement would be received by him because, being an employee of I.C.I., he had entered into the housing agreement and had complied with all its terms and conditions.

In order to participate in the housing scheme an employee of I.C.I., over and above answering that description, and being married, had to comply with a number of conditions. In order to bring himself within the ambit of the scheme he had, of course, as an essential prerequisite, to buy a house and find the purchase money for it either out of his own resources or by means of an ordinary mortgage supplemented by an interest-free loan granted by I.C.I. It is, of course, true that an employee need not buy a house or enter the scheme unless he chose. But any employee buying a house and entering the scheme must, I think, be taken to have done so on the faith of the scheme. Apart from the scheme and the guarantee which it promised, he would in all probability not have ventured to buy a house owing to the risk of capital loss in the event of his having to sell, especially in the case of his being transferred. Then he had to enter into the housing agreement and comply with the conditions on which his right to the indemnity was by that agreement made to depend. In the forefront of those conditions is the positive obligation laid upon him to offer the house for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. This, as I understand it, is an obligation with which the employee is bound to comply in that event and not merely a condition he must fulfil in order to claim the benefit of the guarantee. Moreover, it applies when the employee desires to let and not merely when he desires to sell. This, I think, is a restriction of substance. The employee might have perfectly good reasons for wishing to let rather than sell on being transferred. But the housing agreement precludes him from doing this without first offering the house for sale to I.C.I. Then it is to be observed that the agreement makes it a condition precedent to any claim

under the guarantee that the employee should keep the house in good tenantable repair. It is, of course, true that on spending money on repairs the employee would be maintaining the value of his own property. Nevertheless this stipulation does impose as a condition of benefit an obligation not incumbent upon a freeholder in the ordinary way. Then the provisions as to the termination of the housing agreement include as bringing about such termination the events of the employee letting the house or any part thereof or ceasing to use the house as a permanent residence. It appears to me that the condition against letting, and particularly against letting "any part" of the premises, might operate substantially to the detriment of the employee, as also might the condition against ceasing to use the house as a permanent residence, whatever the precise meaning of that expression may be. Then in the event of the employee desiring to sell otherwise than on transfer or retirement (in which event, as in the case of a sale by the personal representatives of a deceased employee, the house is not apparently required to be offered for sale to I.C.I.), no claim can be made under the indemnity unless I.C.I. consents to the house being sold and the house is first offered for sale to I.C.I.

The rights of first refusal given to I.C.I., particularly the positive obligation the employee is under to offer the house for sale to I.C.I. where an employee desires to sell or let on transfer, might well be advantageous to I.C.I., notwithstanding their obligation under the guarantee, in the event of there being a shortage of suitable accommodation for their employees. One may take it, too, that I.C.I. regard it as expedient from a business point of view that employees should be encouraged to buy houses on the terms of the housing scheme and agreement, thus helping to ease the problem of staff housing.

The matter is put by Mr. Pennycuick as one of pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than services. I cannot share this view. The balance of burden and benefit under the housing agreement must be regarded as at the date when it is entered into with any given employee. When it is entered into no one can tell whether the house will rise or fall in value. If it rises in value or maintains its value, the employee gets no benefit apart from peace of mind. On the other hand, in order to be covered against a possibility of loss which has never materialised, the employee will—it may well be to his detriment—have done or abstained from doing the things which under the housing agreement he is required to do or abstain from doing as a condition of benefit. I.C.I. on its part at least gets the advantage of the right of pre-emption in the event of the employee desiring to sell or let on transfer, which in the circumstances I postulate would entitle I.C.I. to buy simply at the current market value without any addition thereto for depreciation in value, since there would have been none. In the event of the house depreciating in value, the employee does no doubt gain a substantial advantage, but not, as I think, by any means an advantage representing pure bounty on the part of I.C.I. referable to no consideration moving from the employee other than his services.

The transaction may be described as a form of insurance. It cannot bestow any profit on the employee but merely protects him against loss. To segregate the benefit (in cases in which it materialises) from the burden, and to ignore the cost to the employee of obtaining it (in the shape of the purchase money he has laid out in the faith of the housing scheme and agreement and lost through the depreciation in value of the house), ignoring also the other

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forms of consideration moving from the employee as above described, and thus to arrive at the conclusion that the sum paid by I.C.I. under the indemnity by way of recoupment for that loss is a profit of his employment as being a sum received for no consideration other than services appears to me to involve a considerable distortion of the facts.

Mr. Pennycuick says, in effect, that this result must ensue because (*a*) the payment made by I.C.I. under the guarantee is a profit of the employee's employment taxable under Schedule E ; (*b*) under Paragraph 7 of the Ninth Schedule to the Income Tax Act, 1952, the employee cannot deduct any expenses not wholly, exclusively and necessarily incurred in the course of his employment ; and (*c*) the expenditure incurred in the purchase of the house does not answer that description, inasmuch as the employee need not have purchased the house. Mr. Pennycuick says further that if the employee could deduct the amount of his loss on the house, as in fact he could not, tax would be exigible on the corresponding amount paid to him by I.C.I. under the guarantee.

I find it difficult to rid myself of the inclination to think that, if the house-purchase transaction is looked at as a whole, no profit arises from it to the employee even in a case in which the guarantee becomes operative. If that were right then there would be an end of the matter. If it is wrong and any sum paid under the guarantee is to be taken in isolation and looked on as profit, then the question remains whether it was paid by I.C.I. to the employee for no consideration other than services. If it is to be so looked on and was so paid, then I agree with Mr. Pennycuick that no deduction in respect of the employee's outlay on the house would be allowable.

The whole case in a simplified form can be put thus. Suppose an employer makes a bargain with his employee to the effect that if the employee buys a house in a given locality, keeps it in repair, refrains from letting it, uses it as a personal residence and undertakes to give the employer the first refusal of it in the event of his desiring to sell, the employer on his part will guarantee the receipt by the employee on any re-sale by him, whether to the employer or to some other purchaser, of a price equal to the current market value of the house or the amount he paid for it, whichever is the greater. Suppose further that the employee does buy a house and duly complies with all the employer's requirements, and at some time thereafter the stipulated offer to the employer having been made and refused, the employee sells the house to someone else at less than the price he paid, and the employer duly makes good the difference to the employee. In those circumstances, is the difference so made good to the employee, if a profit at all, a profit of his employment, as having been received by the employee in that capacity and for no consideration other than services?

Mr. Pennycuick pointed out that the discharge by an employer of a liability incurred by his employee to a third party may to the extent of the liability thus discharged constitute a profit of the employee's employment. In support of that proposition, which I fully accept, he cited *Hartland* v. *Diggines,* 10 T.C. 247, where an employer paid his employee's Income Tax and this was held to constitute a profit of his employment. He also cited on the same point *Nicoll* v. *Austin,* 19 T.C. 531, where a managing director continued at the company's request to live in his own house, the company paying all outgoings, and these payments were held to be profits of his office. For the proposition that a single payment to an employee may be a profit of the employment, which again I fully accept, he cited *Weston* v. *Hearn,* 25 T.C.

425, where a lump sum paid to an employee on completing 25 years' service was held taxable. For the proposition that a benefit contingently receivable by an employee as a profit of his office or employment is to be treated for tax purposes as income of the year in which it is received, Mr. Pennycuick cited *Edwards* v. *Roberts,* 19 T.C. 618. I think that must be so where no money value can be put on the benefit until it is actually realised. So here, if the payment under the guarantee is rightly to be treated as a profit of the employee's employment, it would seem that it must be treated as accruing on the date on which it became payable, inasmuch as it could not be quantified until the contingency of capital loss materialised. On the main issue in the case, Mr. Pennycuick referred us to the line of cases headed by *Hunter* v. *Dewhurst,* 16 T.C. 605, in which payments made by companies to directors have been considered.

These cases no doubt bear out the broad general proposition attributed to Mr. Pennycuick earlier in this judgment, but they equally bear out the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employee's employment. For example, in *Hunter* v. *Dewhurst* itself Lord Atkin said, at page 645:

> "Rule 1"

—that is to say, of the Rules applicable to Schedule E—

> "appears to me to indicate emoluments either received from the employer or from some third party . . . as a reward for services rendered in the course of the employment."

Again, in *Beak* v. *Robson*[1], [1943] A.C. 352, Lord Simon said, at page 355[2]:

> "In the agreement before us the obligations flowing from the contract of service and the remuneration to be received by the respondent in respect of that service are entirely separate from the restrictive covenant and the consideration which is given for it. **The sum of £7,000 is not paid for anything** done in performing the services in respect of which he is chargeable under sch. E."

We were also referred to the line of cases dealing with payments by third parties, headed by *Herbert* v. *McQuade,* 4 T.C. 489, of which the latest examples are *Moorhouse* v. *Dooland,* 36 T.C. 1, and *Bridges* v. *Hewitt*[3], [1957] 1 W.L.R. 674. This line of authority, besides affording ample recognition of the principle that to be taxable under Schedule E payments made to the holder of an office or employment must be by way of remuneration for his services (see in particular Lord Cave, L.C., in *Reed* v. *Seymour,* 11 T.C. 625, at page 646, a passage too well-known to bear repetition), clearly establishes the proposition that the question whether a given payment is a profit of his office or employment must be viewed from the standpoint of the recipient. This proposition has its origin in the well-known passage from the judgment of Sir Richard Henn Collins, M.R., in *Herbert* v. *McQuade*[4], where he said:

> "the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office".

The following passage from the judgment of Stirling, L.J., in the same case[5], seems to me to be much in point:

> "a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment of any further or other condition on his part".

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(1) 25 T.C. 33. (2) *Ibid.*, at p. 41. (3) 37 T.C. 289. (4) 4 T.C. at p. 500. (5) *Ibid.*, at p. 501.

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I do not see how the payments made by I.C.I. to Mr. Mayes and Mr. Jennings in the present appeals can be held to have satisfied either of these tests. As to the latter, the employee here did have to fulfil further or other conditions. As to the former, I cannot conceive that either of the two Respondents, regarding the matter from their own point of view as recipients of the payments, could possibly have looked upon them as profits of their employment or, in other words, as remuneration accruing to them by reason of their employment by I.C.I., as distinct from payments which in the events which happened they received from I.C.I. under and by virtue of the housing agreement.

I derive assistance, too, from the following passages in *Beak* v. *Robson*[1] and *Cowan* v. *Seymour*[2], [1920] 1 K.B. 500. In *Beak* v. *Robson*, at page 355[3], Lord Simon said:

> "It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received £7,000, but that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under sch. E."

In *Cowan* v. *Seymour*, at pages 517–8[4], Younger, L.J., said:

> "their office or offices as such . . . may have been the causa sine qua non, but they were not the causa causans."

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.

Mr. Pennycuick said, in effect, that a consideration other than services could only be shown if the consideration, other than services, moving from the employee for the benefit received demonstrably represented full value in money or money's worth for the benefit in question. I find no warrant in the authorities for this proposition. It would no doubt be right to disregard a fictitious or colourable bargain designed to disguise what was in fact remuneration as payable on some other account. But nothing of that sort enters into this case. The housing agreement constitutes a genuine bargain, advantageous no doubt to the employee, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payments sought to be taxed in these two appeals.

Mr. Pennycuick said further that if partial consideration in money or money's worth was shown there should be an apportionment, and he instanced *Wales* v. *Tilley*, 25 T.C. 136. But in that case it was possible to apportion the sum received so as to ascertain how much of it was attributable to the director's agreement to a reduction of salary (which was taxable) and how much to commutation of pension (which was not). In the present case obviously there could be no apportionment. It must be all or nothing.

For the reasons I have endeavoured to state, I do not think the sums received by the two Respondents under their respective housing agreements were profits of their employment so as to be taxable under Schedule E, and accordingly in my view both appeals (which it is now agreed must stand or fall together) should be dismissed.

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(1) [1943] A.C. 352; 25 T.C.33.
(2) 7 T.C. 372.
(3) 25 T.C., at pp. 41–42.
(4) 7 T.C., at p. 384.

Parker, L.J.—This is not an easy case and it is with considerable diffidence that I have come to a different conclusion.

I do not think that any useful purpose would be served by going through the authorities. Most of them are conveniently collected in the learned Judge's judgment in the present case and in the recent decision of this Court in *Bridges* v. *Hewitt*(1), [1957] 1 W.L.R. 674. Though there appeared at one time to be an issue between the parties as to the true principle of law involved, I am satisfied that there is no real difference. The principle can, I think, be stated thus. Where you find that an employee has during the course of his employment received from his employer a benefit in money or money's worth, that receipt is a profit of his employment and taxable as such unless (1) it amounts to a gift to him in his personal capacity, for example, a benefit conferred out of affection or pity; or (2) it has been received for a consideration other than the giving of services. This can be put more shortly by saying that such a benefit, to be a profit of his employment, must have been received by him in his capacity of employee as a reward for services. In the two exceptions referred to above, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services.

The real difficulty is as usual in the application of that principle to the facts of the case. I will deal first with what I have referred to as the first exception. It was argued—albeit faintly—that the indemnity when received whether in money or in account was in truth a mere compassionate allowance. It is enough to say that in my judgment that is an impossible argument on the facts found in these cases. The housing scheme formed part of I.C.I.'s staff policy, and the housing agreement was one open to any of a class of employees who wished to avail themselves of it. Whether, however, this can be said to be within the second exception is more difficult and depends on a proper construction of the housing agreement. On behalf of the Crown it is contended that looked at broadly this agreement is wholly for the benefit of the employee and that the real or substantial consideration is services. For the Respondents, on the other hand, it is said that on a proper analysis the housing agreement itself sets out a substantial consideration and that it would be wrong to look outside the contractual terms in that agreement: see *Duke of Westminster* v. *Commissioners of Inland Revenue*, 19 T.C. 490. The housing agreement accordingly, it is said, is purely collateral to the service agreement.

Now I take it to be the law that it is not enough to make an agreement collateral in this sense that there is sufficient consideration to support it. Otherwise an agreement to make a purely voluntary payment for services, for example, in recognition of 25 years' service, would, if under seal, come within the exception. Nor do I think that it is enough to make the agreement collateral that some term is inserted which may be said to be of some advantage to the employer or cause some detriment to the employee. Thus agreements with employees living 20 miles from their place of work that employers would repay half the price of their season tickets could not be said to be collateral merely because the employees would have to buy season tickets as a condition of getting repayment. The question, I think, in every case is one of degree depending upon whether the term can properly, in the surrounding circumstances when the agreement was made, be said to be merely a term of the receipt of additional benefit for the employee's services

(1) 37 T.C. 289.

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or can properly be said to amount in itself to the substantial consideration for the benefit, in which case the consideration is other than for services. In approaching the matter in this way I am not conscious of taking a line in conflict with the *Duke of Westminster's* case(1). I am merely construing the agreement in question in the light of the surrounding circumstances.

While the housing agreement is not altogether easy to construe, I think that the following can be clearly deduced from it. (1) It is no part of the consideration that the employee agrees to be transferred. He has by his service agreement bound himself to go where he is sent, and it is for him to get such living accommodation as he can at his new place of work. (2) If he desires to sell the house he will be entitled to any profit that is realised and he will be indemnified against any loss. (3) In certain events he has to give his employers a first refusal to buy the house, but if they do so he is to get the current market value. In assessing this any offers from prospective purchasers would no doubt have to be taken into consideration. Accordingly the employee can in no event suffer a pecuniary loss, and he gives up nothing of pecuniary value. He is merely in certain cases restricted in his choice of purchasers. (4) Apart from having to give a first refusal in certain events, the only possible detriment he could be said to suffer was that he had to keep the property in good tenantable repair and that on transfer he is not allowed to let it. (5) While there is no express finding to this effect, it is, I think, fair to assume that from time to time, though not in these cases, the first refusal will turn out to be of benefit to the employers in that it may enable them to offer the house to another employee. On the other hand it is clear, and there is an express finding to this effect, that the real object of the agreement is to make the employee contented and free from financial worry.

Bearing these considerations in mind, I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services. It would be quite unrealistic to say that the consideration for the indemnity is the giving in certain events of a first refusal or the obligation to keep in repair. Not only is the object of the agreement to improve the services which the employee is giving, but in my judgment the indemnity is given in consideration of those services just as if the service agreement had itself provided that the remuneration was to include the benefits under any housing agreement. To look at the matter from another angle, if such an agreement had been entered into by I.C.I. with a stranger, it could only be regarded as an instrument of bounty.

Great reliance, however, was placed by the Respondents on the express finding that the salaries payable under the service agreement compared favourably with those paid by other employers not operating a housing scheme. This, it was said, if not conclusive, was at any rate *prima facie* evidence that the consideration under the housing agreement was for something other than services. For my part I find it impossible to attach any weight to this finding or argument. The salary which an employer is able to pay and pays depends on so many factors. One employer may find himself in a position to pay and will pay more than another, and the fact that a good employer is already paying what is found to be a full and adequate salary goes, in my judgment, nowhere towards showing that some other benefit he is prepared to give is not in consideration of services.

Finally, it was contended on behalf of the Respondents that even if the sums were received as a reward for services they were not the profits of employment. The agreement, it was said, only protects the employee against

(1) 19 T.C. 490.

loss—it does not and cannot produce profit—and accordingly the sums received have none of the attributes of income. I confess that I cannot fully understand this argument. If sums received pursuant to an undertaking to pay obligations incurred to third parties are taxable (see *Hartland* v. *Diggines*, 10 T.C. 247, and *Nicoll* v. *Austin*, 19 T.C. 531), I can see no reason why the present sums received pursuant to an agreement by way of indemnity are not equally taxable.

Accordingly, for myself I would allow these appeals.

Pearce, L.J.—In these cases the difficulties come not from any difference in opinion as to what are the principles applicable to them but from a difference as to how those principles should be applied to the facts. The cases turn on the view that one takes of the housing agreement.

The benefit under consideration is taxable as a profit of the employment only if it has been received by the employee in his capacity of an employee as a reward for services and not for some consideration other than the giving of services. Stirling, L.J., said in the well-known passage in *Herbert* v. *McQuade*, 4 T.C. 489, at page 501,

> "a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment of any further or other condition on his part".

I fully accept that the "other condition on his part", the consideration moving from the employee, must be more than a technical consideration. It must not be a mere cloak to conceal any additional benefit given to the employee as such. It must in my view be such as to entitle both the consideration and the benefit obtained thereby to rank as a collateral transaction. The alleged collateral transaction need not be weighed in exact scales in order to see who benefits most by it. Such a task would be hard when on the one side you get a human who may be preoccupied with the price of a house and security against the risk of losing a comparatively small sum, and on the other side a limited company, with millions at its disposal, concerned to see that the human frictions do not clog the machinery of its vast enterprises.

If, looking fairly at the agreement, one can say that this is a fair agreement (albeit generous to the employee in certain events) under which the company gets appreciable benefits (other than the mere benefit of giving a financial advantage to this particular employee and thereby making him a more contented worker) and that the employee gives a genuine and appreciable consideration, then there is enough to make it a collateral transaction. The question how onerous it is to him to give that consideration is a relevant matter but should not, I think, be by itself the deciding factor. When a man gives a consideration that costs him little but is important to a rich recipient, he may fairly receive for it a price that is handsome in some contingencies. Perhaps a convenient test might be this—is this a scheme that could commend itself on its merits to a director who thinks that the company's employees are already adequately paid and does not intend to do anything for the mere purpose of giving them additional financial benefits?

The Crown contends that under the housing agreement the employee gets the reimbursement of loss on his house for no real consideration other than his services as an employee. If this is the true view, the sum in question is taxable. One cannot shut one's eyes to the fact that every large company owning factories in different places and having to transfer staff from one to another for purposes of promotion, organisation or otherwise is bound to

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have a serious concern for the housing of employees so transferred—a concern which could at times become acute. Is this housing agreement seriously intended to help with that housing problem as it affects the company? Or is it merely intended to help the individual employee financially? Or is it a genuine attempt to fulfil both these intentions on a fair and mutual basis?

Under the scheme the employee is reimbursed in respect of loss but he does not make a profit in the normal sense. The first matter dealt with in the agreement is the moment when an employee is transferred. Under clause 2, if an employee who has bought a house on the terms of the agreement is transferred and wishes to sell or let (one of which in the ordinary case he will do) the company shall have a 30 days' option on the house to buy it at a valuation. That clause is definite in its terms, and there is no relaxation of it, as there is in respect of a clause dealing with other situations. Is it unfair to draw the inference from the agreement that this option is of importance to the company? That inference accords with what one might expect as a matter of common sense. At the moment of transfer the company is concerned with the housing of a successor to the man transferred. Secure in the possession of an option, it can appoint a successor, having (and imparting to him) the knowledge that a house is available at a valuation which the company can either buy, if need be, or guide into the successor's possession under its option. Moreover, the option prevents the outgoing employee from being tempted to ask a fancy price from his successor. As other clauses provide for reimbursement of the owner for any loss, the agreement obviates the natural resentment that the owner would feel if compelled to sell to a rich company at what turns out to be a loss. The employee is thus prevented from selling or letting his house on transfer before the company has had a 30 days' option to buy it. It is true that if he wishes to keep on his house without selling or letting he may do so, for example, if he leaves his family behind him. But this seems a reasonable concession, and I see no reason to suppose that in practice it would frequently arise or be used for any deliberate evasion of giving the option. Clause 3 deals with the situation if the option is refused or the employee retires on pension or dies. Presumably it is because of not unreasonable social considerations that there is no provision by which the company can turn out a widow or pensioner. Many men would not enter schemes under which their widows could be evicted on their deaths or they themselves could be evicted on retirement. If any of the three events happen, and within 12 months the house is sold at a loss, the company makes good the loss. If it is not sold within 12 months, and a valuation shows it to be worth less than it cost the employee, plus improvements, the difference is paid by the company to the employee or his representatives. Clause 4 deals with the situation where an employee before a transfer wishes to sell. If he wishes for reimbursement of loss he must obtain the company's consent and give the company a 30 days' option to buy it at valuation. Clause 7 makes it clear that in respect of clause 4 (that is, the time before transfer) the owner is always free to sell at a profit. The fact that clause 7 gives him no such freedom under clause 2 in respect of the moment of transfer would seem deliberate. The period when a man is still working where his house is and he has not been transferred could hardly create any housing problem. If a man sells his home in a place where he is still employed, he presumably does so because he knows that he can rehouse himself. At all events he cannot thereafter blame the company if he is then houseless. It must be remembered that by reason of the agreement the company is probably in touch with the situation regarding the particular house and is quite entitled to make any

offers for it. Under clause 6 the employee has to keep the house in good and tenantable repair as a condition precedent to any reimbursement of loss.

In my view the company gets a definite benefit from the scheme in its general problem of housing staff as well as in its particular solicitude for the welfare of the individual employee, since it entitles it as a rule to a house for his successor. The employee does various things which are a real consideration. He has to find a house within reach of the factory and embark on the venture of buying it, probably entering into a first mortgage and probably producing some money of his own. He must keep the house in good condition. Before he can get any reimbursement he must suffer loss on re-sale. In many cases this will never arise ; but in any event he has to give the company an option to buy it at a valuation on transfer and thereby loses his opportunity of asking possibly an enhanced or fancy purchase price or rent from his successor who might (if unsure of any housing on transfer) be prepared to pay it.

Any assumptions that I have made are, I think, natural inferences that should be drawn from the agreement and are confirmed by the important surrounding circumstance that it is an agreement with a member of the staff made by a large company which has to transfer its employees to various parts of the country. Paragraph 3 (*g*) of the Case Stated with regard to Mayes is not, I think, inconsistent with these inferences. That reads:

> "I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company's action."

The words "might be willing to buy a house" seem to indicate that the company, as one would suppose, wishes to promote the owning of homes by its employees (no doubt for the company's ultimate benefit) and to remove the formidable deterrents that buying and owning a possibly transient home present to the man without capital resources.

It is true that overall the employee gets an advantage in many cases, but I think that this is a careful scheme with some gains and concessions on both sides. It is designed on terms very generous to the employee in certain events but not in my view to an extent that robs it of real mutuality. The employment was a *causa sine qua non* of the benefit, but it was not the *causa causans*. Here there was no one *causa causans*. The benefit was produced by the joint effect of the employment, the finding and purchase of the house, the making of the housing agreement, the transfer of the employee and the loss of value in the house whereby the benefit became payable under the terms of that agreement. I agree with the view expressed by the learned Judge when he says[1] :

> "It was in no true sense a reward for his services. It was an advantage to him but not in my judgment a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers."

I would dismiss these appeals.

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(1) *See* page 688 *ante*.

Mr. F. N. Bucher.—Would your Lordships dismiss both appeals with costs?

Jenkins, L.J.—That follows, Mr. Bucher.

Mr. Alan Orr.—My Lord, I am instructed to ask your Lordships for leave to appeal to the House of Lords should the Crown, after considering your Lordships' judgments, desire to take the case to the House of Lords.

Jenkins, L.J.—What do you say, Mr. Bucher?

Mr. Bucher.—Well, my Lord, though, of course, it is a very large enterprise that is concerned, the actual appeals are appeals of a modest nature.

Jenkins, L.J.—On the list it is entirely between the Revenue and the employees.

Mr. Bucher.—Yes, my Lord. They have had to fight through three Courts already, and I would respectfully submit to your Lordships that the costs your Lordships have allowed here should not be disturbed if your Lordships give the Crown leave to go to the House of Lords.

Jenkins, L.J.—What do you say to that, Mr. Orr? It is quite a usual stipulation.

Mr. Orr.—I am entirely in your Lordships' hands as regards any terms your Lordships might think proper, but I would submit that this is a case where there has been dissenting opinion in your Lordships' Court, and although I entirely accept that this is a case of two taxpayers only, it does concern a scheme which is open generally to all I.C.I.'s employees, so that the total tax involved would be substantial. That is the importance of this matter from the point of view of the Crown.

Jenkins, L.J.—I.C.I. are not in this at all.

Mr. Orr.—I accept that.

Jenkins, L.J.—We think it reasonable that the Crown, as a condition of leave to appeal to the House of Lords, will not seek to disturb the orders for costs made here and below. That leaves the costs in the House of Lords to be determined. I think that is fair.

Mr. Bucher.—If your Lordship pleases.

The Crown having appealed against the above decision in *Hochstrasser* (*H.M. Inspector of Taxes*) v. *Mayes,* this case came before the House of Lords (Viscount Simonds and Lords Radcliffe, Cohen, Keith of Avonholm and Denning) on 13th, 14th and 15th October, 1959, when judgment was reserved. On 30th November, 1959, judgment was given unanimously against the Crown, with costs.

Mr. J. Pennycuick, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown; and Mr. F. N. Bucher, Q.C., and Mr. H. H. Monroe for the taxpayer.

Viscount Simonds.—My Lords, the question at issue in this appeal is whether the Respondent, who was at all material times an employee of Imperial Chemical Industries, Ltd., (I.C.I.), was rightly assessed under Schedule E of the Income Tax Act, 1952, in the sum of £1,170, which included a sum of £350 paid to him in circumstances to be now stated.

I will first remind your Lordships of the relevant statutory provisions. It is by Section 156 of the Income Tax Act, 1952, provided as follows:

> "The Schedule referred to in this Act as Schedule E is as follows—Schedule E 1. Tax under this Schedule shall be charged in respect of every public office or employment of profit . . . 2. Tax under this Schedule shall also

be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule. . . . 5. The provisions set out in the Ninth Schedule to this Act shall apply in relation to the tax to be charged under this Schedule."

The Ninth Schedule so far as relevant was as follows:

"Rules applicable to Schedule E 1. Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

I will now refer to the facts of the case, which I must do by reference to the Case Stated by the Commissioners for the General Purposes of the Income Tax, using so far as possible their own language.

The Respondent is a married man with two children who were born in 1949 and 1953. He has been employed by I.C.I. since 1941, at which time he lived with his parents at Welwyn. His first employment was as a laboratory assistant. In September, 1950, he was transferred to the I.C.I. works at Hillhouse in Lancashire on appointment as an assistant technical officer (chemist). During the first few months, which were a probationary period, he lived in rooms. On 27th April, 1951, he entered into a service agreement with I.C.I., of which for the purpose of this case the salient feature was that he agreed to serve anywhere in the United Kingdom of Great Britain and Northern Ireland and that I.C.I. should be at liberty to change the locality of his employment within those limits. There was also a provision that should I.C.I. require him to change his residence they would pay him such removal and other expenses incidental thereto as they should consider fair and reasonable in the circumstances, and a further provision that the agreement, if not otherwise previously determined, might be terminated by either party by three months' notice in writing.

It was at the time of his transfer to Hillhouse that the Respondent first learned of a scheme established by I.C.I. to assist their married employees to purchase houses for their own occupation, a summary of which was given to him. At first he found trouble in purchasing a house owing to the limitations on price with which he had to comply in order to be eligible for assistance under the scheme, but in June, 1951, he purchased 16, Ribble Road, Fleetwood, for the sum of £1,850, of which £90 was provided by himself, £1,460 was borrowed on first mortgage from a building society and £300 was borrowed on second mortgage from I.C.I. This purchase was made pursuant to a so-called housing agreement, the terms of which have been considered to be of vital importance to this case. It was dated 1st June, 1951, and was in the standard form for which the scheme provided. The agreement is very elaborate in character, defining with great nicety the conditions upon and the limits within which I.C.I. will implement the guarantee against loss upon resale which is its main purpose. Its provisions have been summarised by Jenkins, L.J., and I am glad to adopt his summary, which is as follows(1):

"(i) In the event of the employee being transferred to a new place of employment in the service of I.C.I. and consequently desiring to sell or let the house, the employee must offer to sell the house to I.C.I. If I.C.I. accepts, then the house is to be bought by I.C.I. at the current market value ascertained by valuation; and if such value is less than the employee's

(1) *See* pages 690–1 *ante*.

(Viscount Simonds.)

> expenditure on the house I.C.I. becomes liable to pay the difference to the employee. If I.C.I. declines, then the employee is at liberty to sell to a third party and I.C.I. becomes liable to pay the employee the amount, if any, whereby the price realised falls short of his expenditure on the house. (See clause 2 of the agreements.) (ii) In the event of the sale of the house by the employee or his personal representatives within 12 months after (*a*) the refusal by I.C.I. of an offer made on transfer under (i) above, or (*b*) the retirement of the employee, or (*c*) the death of the employee, whichever first happens, I.C.I. becomes liable to pay to the employee or his personal representatives the amount, if any, whereby the price realised on such sale falls short of the employee's expenditure on the house. (See clause 3 (1).) (iii) If the house is not sold before the expiration of the period of 12 months mentioned in (ii) above, then there is to be a valuation of the house, and I.C.I. becomes liable to pay to the employee or his personal representatives the amount, if any, whereby the employee's expenditure on the house exceeds the amount of the valuation. (See clause 3 (2).) (iv) If, at any time before such one of the three events mentioned in (ii) above as shall first happen, the employee while still in the service of I.C.I. desires to sell the house he may do so, but in that case he is only to be entitled to the benefit of I.C.I.'s guarantee against capital loss if he obtains I.C.I.'s consent to the sale and offers to sell the house to I.C.I. If I.C.I. accepts the offer then the house is to be bought by I.C.I. on similar terms to those stated in (i) above (i.e., with the benefit of the guarantee). If I.C.I. declines the offer then the employee may sell to whom he pleases, and I.C.I.'s guarantee is to apply to any resulting capital loss. (See clause 4.) The agreement is to continue in force for a period expiring 12 calendar months after the death of the employee, but subject to fulfilment of accrued rights it ceases automatically upon such one of the following events as shall first happen, that is to say, if the employee shall: (*a*) be transferred for service with I.C.I. elsewhere and offers to sell the house to I.C.I.; (*b*) retire from the service of I.C.I. on pension; (*c*) cease to be employed by I.C.I. for any other reason; (*d*) sell or let the property or any part thereof; (*e*) cease to use the house as a permanent residence. (See clause 11.) It is a condition precedent to I.C.I. affording to the employee a guarantee against any capital loss he may suffer that the employee shall at all times keep the house in good tenantable repair. (See clause 6.)"

In October, 1954, the Respondent was transferred to Wilton Works in the county of York and thereupon offered his house for sale to I.C.I. under the housing agreement. I.C.I. declined the offer and the Respondent sold it with their consent for £1,500. The sum of £350, being the loss for which I.C.I. admitted liability on resale, was duly paid or credited to the Respondent by I.C.I. This is the sum in respect of which tax under Schedule E is claimed to be exigible from the Respondent.

It is right that I should add one further paragraph from the Case Stated upon which reliance was placed by the Crown or the Respondent. It was as follows:

> "3. . . . (*g*) I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company's action. The agreement cannot operate unless and until the house is sold for less money than it costs to buy. Under the housing agreement the employees cannot make a profit as a result of the housing agreement. An employee's salary is calculated quite independently of anything he might receive under the housing agreement. I.C.I. salaries compare favourably with salaries paid by other employers not operating a housing scheme."

Upon these facts the Commissioners held that the sum in question was not assessable to tax. Their reason was that the payment was to meet a capital loss incurred by the Respondent in fulfilling the obligations of his employment. This is not precisely the way in which the case has been subsequently presented and I need say no more about it.

Upjohn, J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon(1):

> "In my judgment,"

he said,

> "the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in 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."

In this passage the single word "past" may be open to question, but apart from that it appears to me to be entirely accurate. Applying the law thus stated to the facts of the present case, the learned Judge held that the sum of £350 was not a profit "therefrom", that is, arising from the office or employment.

In the Court of Appeal the same view was taken by Jenkins and Pearce, L.JJ. Parker, L.J., as he then was, came to a different conclusion, and for that reason, and in deference to the argument of learned Counsel, I must deal somewhat more fully with the case than I should otherwise have thought necessary. At the outset the learned Lord Justice stated the relevant principle of law thus(2):

> "Where you find that an employee has during the course of his employment received from his employer a benefit in money or money's worth, that receipt is a profit of his employment and taxable as such unless (1) it amounts to a gift to him in his personal capacity, for example, a benefit conferred out of affection or pity; or (2) it has been received for a consideration other than the giving of services."

And he goes on to point out that in these two exceptions, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services—a distinction which, abandoning the vernacular, as Younger, L.J., had in an earlier case(3), Pearce, L.J., describes by saying that the employment in such a case is a *causa sine qua non* of the benefit but not the *causa causans*. Parker, L.J., then examines the facts of the case and comes to a conclusion which he expresses in these words(4):

> "Bearing these considerations in mind, I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services."

This, put in other words, is a finding that the substantial consideration for the payment by I.C.I. of £350 to the Respondent was the rendering of service by him.

My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the *causa causans* or only the *sine qua non* of benefit, which perhaps is only to give the natural meaning to

(1) *See* page 685 *ante*. (2) *See* page 697 *ante*.
(3) In Cowan *v.* Seymour, 7 T.C. 372, at p. 384. (4) *See* page 698 *ante*.

(Viscount Simonds.)

the word "therefrom" in the Statute, it must often be difficult to draw the line and say on which side of it a particular case falls. But I think that the approach should not be exactly that of Parker, L.J. It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the Statute but arbitrarily inferred from it. Thus, in the present case it is for the Crown to establish that a payment made under the housing agreement is a reward for the employee's services. Let me interpolate that the addition of the words "as such" adds nothing to the proposition. How, then, does the Crown seek to prove its case? It does not, and could not, suggest that the agreement is in any way colourable. Nevertheless it is driven to the argument that a payment made under it is a reward for services and nothing else. This argument it fortifies by a close analysis of the benefit or detriment accruing to or suffered by the employee, and concludes that no substantial consideration for the payment moves from the employee. My Lords, I altogether dissent from this argument and conclusion. There is nothing express or implicit in the agreement which suggests that the payment is a reward for services except the single fact of the relationship of the parties, and it is clear enough from the case of *Duke of Westminster* v. *Commissioners of Inland Revenue*, 19 T.C. 490, that that fact alone will not justify such a conclusion. On the other hand, there is the significant fact that the salary earned by the employee compares favourably with salaries paid by other employers not operating a housing scheme, and is the same whether or not he takes advantage of the housing scheme. This at once suggests that there is some other reason for the payment for services rendered or to be rendered. Nor, though it was little stressed by the Respondent, can I ignore his particular status as a married man peculiarly in need of housing accommodation, which made him, with other married employees, an object of particular concern to his employers. In these circumstances I should be disposed to say that the Crown has failed to make a case and leave the matter there. For, assuming, as I must assume, that the agreement is not colourable, I doubt whether it is relevant to ask what, if any, consideration moved from the employee and whether it was substantial or sufficient or what you will. Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain and, as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject the lore of nicely calculated less or more".

My Lords, in the course of the argument a considerable number of authorities were cited, some of them decisions of this House. In nothing that I have said have I intended to cast any doubt upon them. I should not be justified in doing so. But I do not apologise for going back to the very words of the Statute and ignoring explanatory words like "as such", nor do I think it useful to examine whether an agreement under which payment is made is "collateral". The question is one of substance, not form. 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: see *Reed* v. *Seymour*, 11 T.C. 625, and *Herbert* v. *McQuade*, 4 T.C. 489. I do not doubt that a taxable profit may take the form of the discharge of an employee's obligation as well as of a direct payment (cf. *Hartland* v. *Diggines*, 10 T.C. 247), nor that a lump-sum payment to directors may in some circumstances, just as in other circumstances it may not, be subject to tax. Here fine distinctions

have been made which are not directly relevant to the present case. Again, there may well be cases, of which *Nicoll* v. *Austin*, 19 T.C. 531, is an example, where a managing director or other officer of a company is taxable in respect of the outgoings of a house, occupied by him, which are discharged by the company. Such cases may be near the line, as may cases in which the question is whether a payment is made to an employee as a reward for his services or, to use the words of Parker, L.J.'s exception, is made out of affection or pity.

But having said that, my Lords, I must add that in my opinion there is little doubt on which side of the line the present case falls. It was not established by the facts found by the Commissioners nor was it a legitimate inference from those facts that the sum of £350 paid to the Respondent was a reward for his services. The appeal should, in my opinion, be dismissed with costs.

Lord Radcliffe.—My Lords, I have had the opportunity of reading in advance the speech which has just been delivered by my noble and learned friend. I agree with his conclusion that this appeal ought to be dismissed, and I agree with the reasons which he advances for his opinion. It is not necessary, therefore, that I should say more than a few words as to what I regard as the determining consideration in this case.

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 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

(Lord Radcliffe.)

personal embarrassment in having sold his house for a smaller sum than he had given for it.

I regard the employer's payment as being in substance a free benefit conceded to his employee. It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What he wanted was to ease the mind and mitigate the possible distress of an employee who, having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back. To me, therefore, it seems beside the point to scrutinise the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee under the agreement. I should have taken the same view of the result if he had afforded none. The essential point is that what was paid to him was paid to him in respect of his personal situation as a house-owner who had taken advantage of the housing scheme and had obtained a claim to indemnity accordingly. In my opinion, such a payment is no more taxable as a profit from his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance.

My Lords, I said at the beginning that I thought this case was near the borderline. I have tried to indicate clearly why I do not regard the payment as falling on the side of taxability. On the other hand, I do not find in this decision any qualification of the principle that an employer who pays an employee's personal bills as part of his reward for services rendered is paying a taxable wage or profit under Schedule E. That is a different case.

Lord Cohen.—My Lords, the facts have been sufficiently stated by the noble and learned Lord on the Woolsack, and I need not repeat them. The question for your Lordships' decision is whether the Respondent is liable to Income Tax under Schedule E on the sum of £350 which he received, not under his service agreement with I.C.I., Ltd., but under an indemnity contained in the housing agreement entered into between him and the company when on his transfer to Hillhouse he bought a house to accommodate himself and his family and received assistance from I.C.I. in the purchase thereof and an indemnity in certain events against loss on the resale of it for less than the purchase price.

The Crown claimed tax on this sum of £350 as being due under Schedule E in respect of his office or employment with I.C.I. The relevant provision of the Rules applicable to Schedule E is contained in Paragraph 1 of the Ninth Schedule to the Income Tax Act, 1952, which provides that

> "Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever *therefrom* ".

The italics are mine.

This claim has been rejected by the General Commissioners, by Upjohn, J., and by a majority of the Court of Appeal but on somewhat different grounds. The Commissioners rejected it on the ground that the payment was to meet a capital loss and was therefore not assessable to Income Tax.

(Lord Cohen.)

Upjohn, J., adopted the statement of the law by Morris, L.J., in *Bridges* v. *Bearsley*, 37 T.C. 289, where the learned Lord Justice said, at page 324:

> "The fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office."

Accepting this as the true test, Upjohn, J., came to the conclusion that the sum of £350 now in question was not a profit. It was, he said, something which was wholly collateral and really had nothing to do with the office or the services which the Respondent was bound to render to his employers.

Jenkins and Pearce, L.JJ., in the Court of Appeal reached the same conclusion, but Jenkins, L.J., examined the proposition that Mr. Pennycuick advanced on behalf of the Crown in the Court of Appeal and before us, and said that he was prepared to accept that proposition but that, even so, in the facts of the case before him he was satisfied that the Crown's appeal failed. The proposition in its final form before us was that an employee is liable to pay tax under Schedule E on everything received by the employee as such unless it is received for full consideration in money or money's worth other than services as employee.

My Lords, I confess the words "as such" cause me some difficulty. They have been used more than once by learned Judges in reported cases; for instance, by Morris, L.J., in *Bridges* v. *Bearsley*[1], at page 318, when after citing from the Ninth Schedule to the Act the words

> "in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment",

he said:

> "The word 'therefrom' must be construed in its context. A profit accruing by reason of holding an office or employment may be a profit therefrom. This may be so even though some payment which is received is not made by the employer of the recipient and even though the payment is made voluntarily. The profit need not necessarily be in the form of a cash payment. The conception which is introduced by the word 'therefrom' is that some taxable remuneration may accrue to a person by reason of his having or exercising an office or employment of profit. The reference is to what is received by the holder of an office or employment in that capacity: to the holder of the office or employment as such."

My Lords, I am prepared to accept that statement of the law, but it is, I think, clear from the final conclusion of Morris, L.J., in the case last cited and from the decisions cited by Jenkins, L.J., in his judgment in the present case (see especially *Beak* v. *Robson*, [1943] A.C. 352, *per* Lord Simon at page 355[2], and *Cowan* v. *Seymour*, [1920] 1 K.B. 500, *per* Younger, L.J., at page 517[3]) that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The Court must be satisfied that the service agreement was the *causa causans* and not merely the *causa sine qua non* of the receipt of the profit.

My Lords, on the facts of the present case, I am satisfied that Jenkins, L.J., was right when he said[4]:

> "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."

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(1) 37 T.C. (2) 25 T.C. 33, at pp. 41–42. (3) 7 T.C. 372, at p. 384. (4) *See* page 696 *ante*.

(Lord Cohen.)

Parker, L.J., as he then was, did not, I think, differ from his brethren as to the principles of law applicable to the case; he differed only on the application of those principles to the facts of the case, for he said(1):

> "I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services"

for the indemnity against loss.

My Lords, I differ from this conclusion. It is clear from the finding of the Commissioners that the Respondent was receiving under his service agreement the full salary appropriate to the appointment he held: the housing scheme pursuant to which the housing agreement was made was introduced by I.C.I., not to provide increased remuneration for employees, but as part of a general staff policy to secure a contented staff and to ease the minds of employees compelled to move from one part of the country to another as the result of the company's action. The housing agreement itself gave advantages to the company which may not be easy to quantify but which are not negligible or colourable. For these reasons, as well as the reasons given by the noble and learned Lord on the Woolsack, I agree with Jenkins, L.J., that the housing agreement constituted a genuine bargain, advantageous no doubt to the Respondent but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payment sought to be taxed in this appeal.

I would dismiss this appeal.

Lord Keith of Avonholm.—My Lords, I agree.

Lord Denning.—My Lords, Mr. Mayes is a married man with two children. He has for many years been employed by I.C.I. under a service agreement at a salary which at the material time was some £820 a year. It was provided by the agreement that if his employers wished to transfer him from one part of the country to another, they were at liberty to do so, but in that event they were to pay his removal expenses. He was first employed at Welwyn in Hertfordshire, but later he was transferred by the company to Hillhouse in Lancashire. In 1951 he found a house in Lancashire suitable for his needs at a price of £1,850. He had only £90 of his own, so he had to borrow the rest on mortgage. A building society lent him £1,460 at interest and his employers lent him £300 free of interest. I.C.I. had a housing scheme to help employees placed as he was; and it was under this scheme that they lent him the £300. His employers also agreed that, if he were to be afterwards transferred to any other part of the country and so had to leave the house, they would guarantee him against any loss or depreciation on it. The detailed terms were set out in a housing agreement. Three years later I.C.I. transferred him to Wilton in Yorkshire and he had to leave the house. He sold it at a loss. He had paid £1,850 for it but he only sold it for £1,500. So he incurred a loss of £350. His employers, I.C.I., were bound under the housing agreement to indemnify him against this loss and they did so. They paid him £350. He used it to pay off the money he had borrowed, so he made nothing out of it at all. The Crown now claim that this £350 is a profit from his employment and taxable under Schedule E.

My Lords, tried by the touchstone of common sense—which is perhaps rather a rash test to take in a revenue matter—I regard this as a plain case. No one coming fresh to it, untrammelled by cases, could regard this £350 as a profit from the employment. Mr. Mayes did not make a profit on the resale of the house. He made a loss. And even if he had made a profit, it would not have been taxable. How then can his

(1) *See* page 698 *ante*.

loss be taxable, simply because he has been indemnified against it? I can readily appreciate the case which was put in argument—namely, that if an employer, by way of reward for services, agrees to indemnify his employee against his losses on the stock exchange, the payments which the employee received under the indemnity would be taxable. But that would be because the losses were his own affair and nothing to do with his employment: the payments of indemnity would there be a straight reward for services. This payment of £350 was nothing of that kind. It was a loss which Mr. Mayes incurred in consequence of his employment and his employers indemnified him against it. I cannot see that he gets any profit therefrom. If Mr. Mayes had been injured at work and received money compensation for his injuries, no one would suggest that it was a profit from his employment. Nor so here where all he receives is compensation for his loss.

Why, then, if this case is as plain as I think it is, has it got so far as to reach your Lordships' House? Only, I suggest, because of a broad proposition which the Crown advanced about "profits". This proposition was put forward almost as if it were a definition of what the law regards as the "profits" of an employment. It was supported with quite a show of authority. So much so that the Court of Appeal were induced to accept it as correct—though the majority, to be sure, refused to hold that it applied in this case. I need hardly say that, if there were available to your Lordships a definition of "profits", it would be a pearl of great price. But I am afraid that this pearl turned out to be cultivated and not real. It was culled from the cases and not from the Statute. It did not survive the critical examination of your Lordships. When subjected to close scrutiny, it was found to be studded with ambiguities and defaced by exceptions. It would, if accepted, put a greater burden on the taxpayer than ever the Statute warrants, and it would introduce more confusion into a subject where enough already exists.

I would ask your Lordships, therefore, to put on one side the proposition submitted by the Crown and to go back to the words of the Statute. I do not find much help in any of the previous decisions: and the speeches in them cannot rule the day. They show the way in which Judges look at cases and in that sense are useful and suggestive, but in the last resort each case must be brought back to the test of the statutory words.

So tested the question simply is: was this £350 received by Mr. Mayes a "profit" from his employment? I think not, for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word. I would therefore dismiss this appeal.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Mr. J. W. Ridsdale, I.C.I., Ltd., Legal Department.]
