

NO. 973—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—  
13TH AND 14TH DECEMBER, 1934

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COURT OF APPEAL—2ND AND 3RD JULY, 1935

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EDWARDS (H.M. INSPECTOR OF TAXES) v. ROBERTS

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*Income Tax, Schedule E—Emoluments of office—Date of accrual—Beneficial interest in trust fund created by employers.*

The Respondent was employed by a company under a service agreement dated August, 1921, which provided, inter alia, that, in addition to an annual salary, he should have an interest in a "conditional fund", which was to be created by the company by the payment after the end of each financial year of a sum out of its profits to the trustees of the fund to be invested by them in the purchase of the company's shares or debenture stock. Subject to possible forfeiture of his interest in certain events, the Respondent was entitled (i) to receive the income produced by the fund at the expiration of each financial year, and (ii) to receive part of the capital of the fund (or, at the trustees' option, the investments representing the same) at the expiration of five financial years and of each succeeding year, and, on death while in the company's service or on the termination of his employment by the company, to receive the whole amount then standing to the credit of the capital account of the fund (or the actual investments).

The Respondent, with the company's consent, resigned from its service in September, 1927, and at that date the trustees of the fund transferred to him the shares which they had purchased out of the payments made to them by the company in the years 1922 to 1927. He was assessed to Income Tax under Schedule E for 1927-28 on the amount of the current market value of the shares at the date of transfer. He appealed, contending (1) that, notwithstanding the liability to forfeiture of his interest in certain events, immediately a sum was paid by the company to the trustees of the fund he became invested with a beneficial interest in the payment which formed part of his emoluments for the year in which it was made, and for no other year, and that, accordingly, the amount of the assessment for the year 1927-28 should not exceed the amount paid into the fund during the year of assessment, and (2), alternatively, that the assessment for 1927-28 ought not, in any event, to exceed the aggregate of the sums paid by the company to the trustees, the difference between that amount and the value of the investments at the date of transfer representing a capital appreciation not liable to tax for any year.

Held, (1) that the Respondent did not obtain a vested interest in the yearly payments made to the trustees at the dates when they were respectively made, and (2) that the value of the investments at the date of transfer to the Respondent by the trustees constituted additional remuneration of the year in which the transfer took place.

*Smyth v. Stretton*, 5 T.C. 36, distinguished.

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CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 11th January, 1934, J. H. Roberts (hereinafter called the Respondent) appealed against an additional assessment to Income Tax in the sum of £1,639 for the year ended 5th April, 1928, made upon him under Schedule E of the Income Tax Acts in respect of his interest in a "Conditional Fund" created by his employers.

2. The Respondent was at all material times an employee of Henley's Telegraph Works, Limited, (hereinafter called the Company) serving in the capacity of an accountant under the terms of an agreement with the Company dated the 26th day of August, 1921. (A copy of this agreement, marked "A", is attached to and forms part of this Case.)

3. For the purposes of this Case the material Clauses of the agreement are those numbered 5, 6, 7, 8, 10 and 11 which are set out below.

" 5. The Company shall during the continuance of this Agreement pay to the Employee a salary at the rate of £425 0s. 0d. per annum (or at such other rate as may from time to time be agreed between the Company and the Employee) by equal monthly instalments on the last day of each calendar month and as an additional inducement to the Employee more effectively to perform his duties and assist in promoting and advancing the interests of the Company the Company will also create the Conditional Fund hereinafter mentioned and the Employee shall, subject to the conditions hereinafter set forth, be interested in the said Fund as after mentioned.

" 6. The Company will within one calendar month of the final settlement and audit of the Company's accounts after the expiration of each financial year of the Company create the Conditional Fund by setting aside out of the net profits of the Company and paying to two Trustees who shall be from time to time appointed by Resolution of the Board of the Company (and any Director or Directors of the Company may be such

" Trustee or Trustees) a sum equal to one shilling and sixpence  
 " per One hundred pounds on the gross amount which shall be  
 " divided amongst the holders of the Preference and Ordinary  
 " Shares of the Company as dividend or bonus upon their shares  
 " in respect of such financial year and also upon any sum which  
 " shall be transferred from the Profit and Loss Account of  
 " such year to General Reserve Account Provided that in the  
 " event of any portion of such Reserve Account being in any  
 " subsequent year re-transferred to Profit and Loss Account the  
 " percentage to be carried to the Conditional Fund in such  
 " subsequent year shall be reduced by the percentage upon the  
 " amount so re-transferred For the purpose of this Agreement  
 " the decision of the Auditors of the Company as to the amount  
 " to be so paid to the Trustees of the said Conditional Fund  
 " in any year shall be final and conclusive and binding upon  
 " both parties to these presents.

" 7. All sums so paid over to the Trustees as aforesaid shall  
 " be invested by them in the purchase of Ordinary or  
 " Preference Shares or Debenture Stock of the Company.

" 8. The Employee shall, subject to the conditions herein-  
 " after contained, be interested in the Conditional Fund in the  
 " manner and to the extent following but not further or  
 " otherwise viz. :—

" (A) The Employee shall at the expiration of each com-  
 " plete financial year of the Company expiring after the date  
 " of this Agreement be entitled to receive the income from  
 " time to time produced during such financial year by the  
 " said Conditional Fund as and when the same is received  
 " by the Trustees.

" (B) The Employee shall at the expiration of five of such  
 " complete financial years after the date of this Agreement  
 " and at the expiration of each such complete subsequent  
 " financial year be entitled to receive such part of the capital  
 " of the said Conditional Fund (or at the option of the  
 " Trustees the actual investments then representing the  
 " same) as shall at the expiration of each such period have  
 " been in the hands of the Trustees for the full period of five  
 " years from the date when the same was paid over to them.

" (C) In the event of the death of the Employee while  
 " still in the service of the Company his legal personal repre-  
 " sentatives shall be entitled to receive within six calendar  
 " months from the date of such death the amount then  
 " standing to the credit of the Capital Account of the  
 " Conditional Fund or at the option of the Trustees to the  
 " actual investments then representing the same and also to  
 " any portion of the income arising therefrom during the life-  
 " time of the Employee which shall not have previously been  
 " paid over to him.

“(D) If the employment of the Employee shall be terminated by the Company pursuant to the provisions of Clause 9 hereof he shall have the same rights as his legal personal representatives would have had under Sub-clause (C) of this Clause if he had died at the date of the expiration of the notice mentioned in Clause 9 hereof.

“(E) For the purposes of the events provided for by Sub-clauses (C) and (D) of this Clause an apportionment shall also be made at the end of the then current financial year of the amount to be carried to the Conditional Fund for such current financial year and the apportioned amount when ascertained as aforesaid shall be carried to the said Conditional Fund as if the same had accrued and been carried to the said fund *de die in diem* during such year and shall be paid over to the Employee or his legal personal representatives at the expiration of six calendar months from the end of such financial year.

“10. The Employee shall absolutely cease to have any further right claim or interest to or in the said Conditional Fund or the investments thereof or the income which has then arisen or may arise therefrom in any of the events following viz. :—

“(A) If the Employee shall be dismissed by the Company for misconduct or shall cease to be in the employment of the Company in his present or a higher position for any reason except as mentioned in Clause 9 hereof.

“(B) If the Employee shall assign or create or purport to or attempt to create any mortgage or charge upon his said salary or upon his interest in the said Conditional Fund.

“(C) If the Employee shall either by operation of Law or as the consequence of any act matter or thing done or suffered by him cease to be beneficially entitled either in whole or in part to the personal receipt and enjoyment of his said salary or of his interest in the Conditional Fund or any income arising therefrom.

“11. Subject to the interest of the Employee therein the Trustees shall hold the Conditional Fund upon trust for the Company.”

4. Under the provisions of the said agreement the following payments were made by the Company to the Trustees of the Conditional Fund on account of the Respondent.

<i>Date of payment to the Trustees.</i>	<i>Amount.</i>
22nd April, 1922 ... ..	£95 12 10
12th March, 1923 ... ..	99 0 9
10th March, 1924 ... ..	98 14 8
5th June, 1925 ... ..	252 10 0
25th June, 1926 ... ..	282 12 3
1st July, 1927... ..	331 14 2



5. The payments so made by the Company were applied by the Trustees of the said Fund in the purchase of the following Ordinary Shares in the Company on the dates and at the prices mentioned below.

<i>No. of Shares.</i>	<i>Date of Purchase.</i>	<i>Purchase Price.</i>
44 ...	3rd May, 1922 ...	£95 12 10
42 ...	16th March, 1923 ...	99 0 9
40 ...	20th March, 1924 ...	98 14 8
79 ...	12th June, 1925... ..	252 10 0
72 ...	2nd July, 1926 ... ..	282 12 3
70 ...	1st July, 1927 ... ..	331 14 2
		£1,160 4 8

6. The Respondent with the consent of the Company resigned from the service of the Company in September, 1927, and at that date the Trustees handed over to him the actual investments that had been made by them as set out in Clause 5 of this Case. The current market value of these investments at that date was £1,640.

7. Specimen correspondence between the Trustees of the Conditional Fund and the Respondent was exhibited to us as showing the nature of the communications between these parties in connection with the payment to the Respondent of dividends upon the shares purchased by the Trustees on account of the Respondent and also in connection with the yearly purchase of shares by the application of the payments made to the Trustees by the Company. (This copy correspondence, marked " B " and " C ", is attached to and forms part of this Case<sup>(1)</sup>.)

8. On behalf of the Respondent it was contended :—

- (a) That immediately upon the making of a payment by the Company to the Trustees of the Conditional Fund in accordance with the provisions of Clause 6 of the agreement of the 26th August, 1921, the Respondent became invested with a beneficial interest in such payment, notwithstanding that upon the happening of any one of certain events specified in Clause 10 of the said agreement such beneficial interest would have become liable to forfeiture.
- (b) That all payments made by the Company to the Trustees of the Conditional Fund in accordance with the provisions of the said agreement formed a part of the emoluments of the Respondent for the years in which such payments were respectively made to the Trustees and not for any other year or years; and accordingly
- (c) That the additional assessment upon the Respondent for the year 1927-28 ought not to exceed the sum of £332, that being the amount of the only payment made by the

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<sup>(1)</sup> Not included in the present print.

Company to the Trustees in accordance with the provisions of the said agreement during the year ended the 5th April, 1928; and, in the alternative and without prejudice to the foregoing,

- (d) That the amount by which the capital value of the investments as at the date on which the same were transferred by the Trustees to the Respondent, namely, £1,640, exceeded the aggregate of the sums paid by the Company to the Trustees, namely £1,160, represented a capital appreciation and formed no part of the emoluments of the Respondent for 1927-28 or any other year; and accordingly that the said additional assessment ought not in any event to exceed the sum of £1,160.

9. On behalf of H.M. Inspector it was contended:—

- (a) That the Respondent did not acquire a vested interest in the investments until the conditions in Clause 10 of the agreement had been satisfied, and the shares transferred to him by the Trustees.
- (b) That the payments made yearly to the Trustees for the ultimate benefit of the Respondent did not represent income to the Respondent in those years, his interest being contingent upon the fulfilment of the conditions in Clause 10 of the agreement.
- (c) That the value of the investments at the date of transfer to the Respondent by the Trustees represented additional remuneration given to him by the Company because he had fulfilled the stipulated conditions.
- (d) That the assessment as made was correct and should be confirmed.

10. We, the Commissioners who heard the appeal, were of opinion that, in view of the decision in *Smyth v. Stretton*, 5 T.C. 36, and particularly the decision in respect of the moiety of the sum there in dispute which was only conditionally receivable, we must hold that the sums paid by the Company to the Trustees for the benefit of the Respondent formed part of the Respondent's emoluments as and when they were paid over to the Trustees year by year and were assessable to Income Tax at that time, and we reduced the additional assessment to the sum of £332, being the amount so paid over in the year of assessment.

11. 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, 1918, Section 149, which Case we have stated and do sign accordingly.

P. WILLIAMSON, } Commissioners for the Special  
 MARK STURGIS. } Purposes of the Income Tax Acts.  
 P. WILLIAMSON, } Commissioners for the Special  
 York House, MARK STURGIS, } Purposes of the Income Tax Acts.  
 23, Kingsway,  
 London, W.C.2.

26th June, 1934.

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### EXHIBIT A

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This Agreement made the 26th day of August 1921 between W. T. Henley's Telegraph Works Company, Limited, (hereinafter referred to as "the Company") of the one part and John Hamilton Roberts, of 46, Glinparke Road, Forest Gate, London, E. (hereinafter referred to as "the Employee") of the other part Whereas the Employee is now in the employ of the Company as Accountant at a salary of £425 0s. 0d. per annum payable monthly and Whereas the Company is desirous that the Employee should be interested in the success and prosperity of the Company and for that purpose has determined to give to him a conditional interest in the profits as hereinafter defined.

Now it is hereby agreed by and between the parties hereto as follows :—

1. The Employee shall continue to well and faithfully serve the Company as Accountant or in such other capacity as may from time to time be agreed between the Company and the Employee.

2. The Employee shall devote the whole of his time and attention to the duties of his office and shall use his best endeavours to promote the interests of the Company in all things and he shall not in any way during the period of his employment either in or out of office hours carry on or be engaged or interested either directly or indirectly in any other business whatsoever.

3. The Employee shall in the performance of his duties obey all such instructions as shall from time to time be given to him by the Managing Director or the Secretary of the Company as the representative of the Board of Directors.

4. The Employee shall faithfully keep all secrets of the business of the Company with which he may become acquainted in the course of his employment and shall not divulge or make use of them for any purpose whatsoever outside the business of the Company.

5. The Company shall during the continuance of this Agreement pay to the Employee a salary at the rate of £425 0s. 0d. per annum (or at such other rate as may from time to time be agreed between the Company and the Employee) by equal monthly instalments on

the last day of each calendar month and as an additional inducement to the Employee more effectively to perform his duties and assist in promoting and advancing the interests of the Company the Company will also create the Conditional Fund hereinafter mentioned and the Employee shall, subject to the conditions hereinafter set forth, be interested in the said Fund as after mentioned.

6. The Company will within one calendar month of the final settlement and audit of the Company's accounts after the expiration of each financial year of the Company create the Conditional Fund by setting aside out of the net profits of the Company and paying to two Trustees who shall be from time to time appointed by Resolution of the Board of the Company (and any Director or Directors of the Company may be such Trustee or Trustees) a sum equal to one shilling and sixpence per One hundred pounds on the gross amount which shall be divided amongst the holders of the Preference and Ordinary Shares of the Company as dividend or bonus upon their shares in respect of such financial year and also upon any sum which shall be transferred from the Profit and Loss Account of such year to General Reserve Account Provided that in the event of any portion of such Reserve Account being in any subsequent year re-transferred to Profit and Loss Account the percentage to be carried to the Conditional Fund in such subsequent year shall be reduced by the percentage upon the amount so re-transferred For the purpose of this Agreement the decision of the Auditors of the Company as to the amount to be so paid to the Trustees of the said Conditional Fund in any year shall be final and conclusive and binding upon both parties to these presents.

7. All sums so paid over to the Trustees as aforesaid shall be invested by them in the purchase of Ordinary or Preference Shares or Debenture Stock of the Company.

8. The Employee shall, subject to the conditions hereinafter contained, be interested in the Conditional Fund in the manner and to the extent following but not further or otherwise viz. :—

(A) The Employee shall at the expiration of each complete financial year of the Company expiring after the date of this Agreement be entitled to receive the income from time to time produced during such financial year by the said Conditional Fund as and when the same is received by the Trustees.

(B) The Employee shall at the expiration of five of such complete financial years after the date of this Agreement and at the expiration of each such complete subsequent financial year be entitled to receive such part of the capital of the said Conditional Fund (or at the option of the Trustees the actual investments then representing the same) as shall at the expiration of each such period have been in the hands of the Trustees for the full period of five years from the date when the same was paid over to them.



(C) In the event of the death of the Employee while still in the service of the Company his legal personal representatives shall be entitled to receive within six calendar months from the date of such death the amount then standing to the credit of the Capital Account of the Conditional Fund or at the option of the Trustees to the actual investments then representing the same and also to any portion of the income arising therefrom during the lifetime of the Employee which shall not have previously been paid over to him.

(D) If the employment of the Employee shall be terminated by the Company pursuant to the provisions of Clause 9 hereof he shall have the same rights as his legal personal representatives would have had under Sub-clause (C) of this Clause if he had died at the date of the expiration of the notice mentioned in Clause 9 hereof.

(E) For the purposes of the events provided for by Sub-clauses (C) and (D) of this Clause an apportionment shall also be made at the end of the then current financial year of the amount to be carried to the Conditional Fund for such current financial year and the apportioned amount when ascertained as aforesaid shall be carried to the said Conditional Fund as if the same had accrued and been carried to the said Fund *de die in diem* during such year and shall be paid over to the Employee or his legal personal representatives at the expiration of six calendar months from the end of such financial year.

9. If the Employee shall become for a period of three calendar months incapable of properly performing his duties through ill-health or any other cause or if the Board shall come to the conclusion that it is in the interest of the Company desirable to terminate his employment the Company may in any such case determine his employment by one month's notice in writing.

10. The Employee shall absolutely cease to have any further right claim or interest to or in the said Conditional Fund or the investments thereof or the income which has then arisen or may arise therefrom in any of the events following viz. :—

(A) If the Employee shall be dismissed by the Company for misconduct or shall cease to be in the employment of the Company in his present or a higher position for any reason except as mentioned in Clause 9 hereof.

(B) If the Employee shall assign or create or purport to or attempt to create any mortgage or charge upon his said salary or upon his interest in the said Conditional Fund.

(C) If the Employee shall either by operation of Law or as the consequence of any act matter or thing done or suffered by him cease to be beneficially entitled either in whole or in part to the personal receipt and enjoyment of his said salary or of his interest in the Conditional Fund or any income arising therefrom.

11. Subject to the interest of the Employee therein the Trustees shall hold the Conditional Fund upon trust for the Company.

12. No Trustee shall in any case be liable for any loss arising in respect of the said Conditional Fund or any investments thereof unless the same shall have arisen from his own personal malversation thereof.

13. In case any difference shall arise between the Employee and the Company under these presents the same shall be referred to the Auditors of the Company or the senior partner of any firm who may be the Auditors of the Company for the time being as sole arbitrator and his decision shall be final and these presents shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889.

In Witness whereof these presents have been signed on behalf of the Company by George Sutton the Managing Director thereof being thereunto duly authorised by Resolution of the Board and by the said Employee the day and year first above written.

Signed by the said George Sutton

in the presence of :

(Signed) G. SUTTON.

H. M. Jacob,  
13/14, Blomfield Street,  
London, E.C.

Clerk.

Signed by the said Employee in  
the presence of :

(Signed) J. H. ROBERTS.

B. C. Wilkins,  
11, Hallswelle Road,  
Golders Green, N.W.11.  
Clerk.

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The case came before Singleton, J., in the King's Bench Division on the 13th and 14th December, 1934, and on the latter date judgment was given against the Crown, with costs.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. F. Heyworth Talbot for the Respondent.

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#### JUDGMENT

**Singleton, J.**—This is not an easy case, and I remember Mr. Justice Channell said the same with regard to an earlier case on a somewhat similar subject, which case has been cited to me<sup>(1)</sup>. The appeal arises in this way. It is sought to levy an additional assessment in the sum of £1,639 for the year ended 5th April, 1928, under

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<sup>(1)</sup> Smyth v. Stretton, 5 T.C.36.

(Singleton, J.)

Schedule E of the Income Tax Act, 1918, in respect of the Respondent's interest in a Conditional Fund created by his employers. The Respondent, Mr. Roberts, was at all material times an employee of Henley's Telegraph Works, Limited, serving in the capacity of an accountant under the terms of an agreement with the Company which is dated the 26th August, 1921, and to which I have been referred in some little detail. That agreement which provided for the service of the Respondent began with two recitals, the first in these terms : "Whereas the Employee is now in the employ of the Company as Accountant at a salary of £425 0s. 0d. per annum payable monthly." The second recital is : "Whereas the Company is desirous that the Employee should be interested in the success and prosperity of the Company and for that purpose has determined to give to him a conditional interest in the profits as hereinafter defined." The agreement contains certain provisions and I go directly to Clause 5 : "The Company shall during the continuance of this Agreement pay to the Employee a salary at the rate of £425 0s. 0d. per annum (or at such other rate as may from time to time be agreed between the Company and the Employee) by equal monthly instalments on the last day of each calendar month and as an additional inducement to the Employee more effectively to perform his duties and assist in promoting and advancing the interests of the Company the Company will also create the Conditional Fund hereinafter mentioned and the Employee shall, subject to the conditions hereinafter set forth, be interested in the said Fund as after mentioned."

Then Clause 6 of the agreement provides how the Conditional Fund is to be established in these terms : "The Company will within one calendar month of the final settlement and audit of the Company's accounts after the expiration of each financial year of the Company create the Conditional Fund by setting aside out of the net profits of the Company and paying to two Trustees who shall be from time to time appointed by Resolution of the Board of the Company (and any Director or Directors of the Company may be such Trustee or Trustees) a sum equal to one shilling and sixpence per One hundred pounds on the gross amount which shall be divided amongst the holders of the Preference and Ordinary Shares of the Company as dividend or bonus upon their shares in respect of such financial year." Then follows a provision as to transferring likewise a sum in respect of a transfer to the Reserve Fund of the Company on which nothing arises, I am told, although I thought at one time something might arise on it.

Clause 7 of the agreement provides that : "All sums so paid over to the Trustees as aforesaid shall be invested by them in the purchase of Ordinary or Preference Shares or Debenture Stock of the Company."

**(Singleton, J.)**

Clause 8 provides: "The Employee shall, subject to the conditions hereinafter contained, be interested in the Conditional Fund in the manner and to the extent following but not further or otherwise viz. :—(A) The Employee shall at the expiration of each complete financial year of the Company expiring after the date of this Agreement be entitled to receive the income from time to time produced during such financial year by the said Conditional Fund as and when the same is received by the Trustees. (B) The Employee shall at the expiration of five of such complete financial years after the date of this Agreement and at the expiration of each such complete subsequent financial year be entitled to receive such part of the capital of the said Conditional Fund (or at the option of the Trustees the actual investments then representing the same) as shall at the expiration of each such period have been in the hands of the Trustees for the full period of five years from the date when the same was paid over to them. (C) In the event of the death of the Employee while still in the service of the Company his legal personal representatives shall be entitled to receive within six calendar months from the date of such death the amount then standing to the credit of the Capital Account of the Conditional Fund or at the option of the Trustees to the actual investments then representing the same and also to any portion of the income arising therefrom during the lifetime of the Employee which shall not have previously been paid over to him." Then I need not read (D) and (E) of Clause 8.

Clause 9 is: "If the Employee shall become for a period of three calendar months incapable of properly performing his duties through ill-health or any other cause or if the Board shall come to the conclusion that it is in the interest of the Company desirable to terminate his employment the Company may in any such case determine his employment by one month's notice in writing."

Clause 10 reads: "The Employee shall absolutely cease to have any further right claim or interest to or in the said Conditional Fund or the investments thereof or the income which has then arisen or may arise therefrom in any of the events following viz. :—(A) If the Employee shall be dismissed by the Company for misconduct or shall cease to be in the employment of the Company in his present or a higher position for any reason except as mentioned in Clause 9 hereof. (B) If the Employee shall assign or create or purport to or attempt to create any mortgage or charge upon his said salary or upon his interest in the said Conditional Fund." (C) I need not read. Clause 11 is: "Subject to the interest of the Employee therein the Trustees shall hold the Conditional Fund upon trust for the Company."

In the years 1922 to 1927 certain payments (which are set out in the Case) were made by the Company to the trustees of the Conditional Fund on account of the Respondent. The sums so set aside,



(Singleton, J.)

speaking generally, were applied forthwith in the purchase of Ordinary Shares in the Company. The total of the sums so set aside between the years 1922 and 1927 and invested in the purchase of shares was £1,160 4s. 8d. The Respondent resigned from the service of the Company in September, 1927, with the consent of the Company, and at that date the trustees handed over to him the actual investments that had been made by them to which I have already referred. The current market value of those investments at the date when they were handed over was the sum of £1,640. It is not very clear how the Respondent came to resign, and it might have been an advantage if we had had further facts on that matter, but he was handed securities representing that which would have been the amount of the "Conditional Fund" set aside for him under the agreement. It was pointed out by Mr. Hills to me that under the strict reading of Clause 10 (A), coupled with Clause 9, if he resigned from the service of the Company his interest in the fund would cease absolutely. I suppose—I do not know—that if he desired to resign, the Company could have given him notice under Clause 9 of the agreement and thus his interest in the fund would have been preserved.

The Crown seeks to assess the Respondent in respect of the sum of £1,639 or £1,640, the value of the securities handed over to him in September of 1927. If I had come to the conclusion that the contention of the Crown was right, a further question might have arisen as to whether or not the true figure ought to be the value of the securities at the date they were handed over, or ought to be the total of the amounts credited year by year. Such question does not arise having regard to the conclusion to which I have come in this case.

One of the contentions of the Respondent was "that immediately upon the making of a payment by the Company to the Trustees of the Conditional Fund in accordance with the provisions of Clause 6 of the agreement of the 26th August, 1921, the Respondent became invested with a beneficial interest in such payment, notwithstanding that upon the happening of any one of certain events specified in Clause 10 of the said agreement such beneficial interest would have become liable to forfeiture". The other contentions are set out. I need not refer to them.

It is common ground that the sums which were paid to or set aside for the Respondent constitute emoluments of his office. The question Mr. Hills puts before me is: what is the date on which those emoluments accrued? Each year a sum was set aside, the sums totalling the figure which I have given of a little over £1,100. I should have been in considerable difficulty in this case if I had not had before me the decision of Mr. Justice Channell in *Smyth v. Stretton*, 5 T.C.36. In that case "A sum of £35 was placed to the credit of the respondent by the Governors of Dulwich College under the Provident Scheme for the Assistant Masters of the

(Singleton, J.)

“College. Of this sum no part is payable until the respondent leaves the College or until his decease ; he cannot raise money on it ; and as regards one moiety payment is contingent on a certain length of service and on good conduct.” It was held by Mr. Justice Channell “that the whole sum is a taxable addition to the respondent’s salary”.

When one looks at the facts of that case one finds set out under the Scheme for the establishment of a Provident Fund for the benefit of the assistant masters on the permanent staff of the Dulwich College pursuant to the Resolution of the Board dated 25th April, 1899, that certain provisions are made for assistant masters and it is true, as Mr. Hills points out, and as is pointed out in the judgment of Mr. Justice Channell, that the matters therein dealt with are described as “increase of salaries”. The second moiety referred to in the case is under 1 (c) of the Scheme : “A further addition, equal in amount to the above sums, shall be granted from the same date to the Assistant Masters alluded to in (a) and (b), such addition being, however, subject to the conditions provided by Paragraph 5.” Paragraph 5 was in this form : “That Assistant Masters having less than ten years’ service who may resign their appointments, or from any other cause than ill-health cease to belong to the College, shall be entitled to receive the total increase sanctioned by (a) and the accumulations thereof, but shall not receive the additional increase sanctioned by (c), or the accumulations thereof. In the event of any such Assistant Master retiring from ill-health the Governors, in addition to the increase sanctioned by (a), may grant him the further 5 per cent. sanctioned by (c), and the accumulations thereof. In the event of death of any such Assistant Master whilst in the service of the College, the 5 per cent. due by (c) as well as under (a), with the accumulations thereof, shall be paid to his legal representative”, that is, with regard to masters of less than 10 years’ service the granting of the second moiety or the additional 5 per cent. is discretionary in the Governors. Paragraph 6 of the Scheme shows “That Assistant Masters who shall have served ten years or upwards, and who may retire before the age of sixty from any other cause than misconduct shall receive the total sum due to them respectively under (a) or (b) and (c)”, that is to say, they would not receive it if they were dismissed through misconduct, as indeed paragraph 7 shows likewise.

Mr. Justice Channell in the course of his judgment at page 45 (1), having referred to the first 5 per cent., goes to the next 5 per cent. and he says : “The next one,”—that is (c)—“if it stood alone, would be certainly very arguable ; I am not quite clear about it now, but it seems to me that being put as it is with the

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(1) *Smyth v. Stretton*, 5 T.C. 36, at p. 45.

(Singleton, J.)

“ other sum which is clearly salary, and being in express and clear words used not by ignorant people—notwithstanding what I have said as to their grammar, and other things—but by people, namely, the Governors and Masters of this College, who must be considered to understand quite well what they say, it has been stated distinctly to be salary, and it seems to me not by any means necessary to prevent it being salary, because there is a binding obligation as to this sum (c) that it shall be left in the hands of the Governors of the College upon certain specified terms, which are as to (c) not that they are to have it in every possible event, they are not to have it if they do not serve for 10 years, unless their non-service for as much as 10 years depends on the case of ill-health; and then in the case of ill-health it is discretionary with the Governors to give it. So in that case, if they have served for less than 10 years, they do not get this sum (c) as of right, and also if they are removed for misconduct or have resigned to avoid being removed for misconduct they do not receive that sum, but that sum in those cases, if it is not given to them, goes into a general fund, which the Governors are to distribute to exceptional and special cases requiring and deserving assistance.” Two things at least appear from those words which I have read. The first is that the second sum of 5 per cent. in the case of *Smyth v. Stretton* was in certain events payable only at the discretion of the Governors; secondly, that though the sum was set aside as part of a Provident Fund the right to it disappeared if the master for whose benefit, in the first instance, it had been set aside, was dismissed for reasons of misconduct or gave notice to avoid being dismissed for misconduct.

In the circumstances of the present case, a fund is set aside which is described in the Case as a Conditional Fund. The right to that fund on the part of the employee may be lost if he is guilty of misconduct, and it is said, too, that it may be lost if he leaves other than under Clause 9 of the agreement. It seems to me, though, that if one looks at the interest which the employee gets in that fund, it is a stronger interest than the schoolmaster got in the fund referred to in the case of *Smyth v. Stretton*. It is true that in dealing with that case Mr. Justice Channell said that they had described this as an increase of salary. I do not see that great importance attached to that for the purposes of this case, because it is agreed that these were emoluments of the office, and what one has to consider in coming to a conclusion in this case is “salaries, fees, wages, perquisites or profits whatsoever therefrom”. Mr. Justice Channell at an earlier part of his judgment at page 42 said this: “I agree with what Mr. Danckwerts says, you must look at the substance of it and not the words.” If one looks at the substance of this, one finds that the employee is given a salary plus an interest in the profits of the Company—true, an interest which may be defeated.

(Singleton, J.)

I think the intention was and the substance of the matter is that this was intended as additional remuneration to the employee as at the time of the calculation and payment of the amount which was due to him. That is how I read it, in view of what Mr. Justice Channell said in the case of *Smyth v. Stretton*<sup>(1)</sup> as to what one must look at, and in view of his decision in that case, thinking, as I do, that this case is even stronger in deciding that the payment must be taken year by year than the case of *Smyth v. Stretton*, with which Mr. Justice Channell had to deal.

Mr. Hills referred me to the case of *Walker v. Reith*, (1906) 8 F. 381. The facts are quite different in that case, and I observe from the judgment of Lord Stormonth-Darling at page 388 that what he said was this : " Now, what is the effect of the deed of arrangement " on the legal position of these employees until the time arrives for " Mr. Dick's trustees making a conveyance of the business in their " favour ? Are they still only employees, with a right to salary and " immediate payment of a small percentage on profits, together " with a prospective and contingent interest in the business itself ? " Or are they a purchasing partnership, with immediate entry to " the business, but with a postponement of the obligation to pay " the price, and only such limitations on their right of property as " are necessary to give the seller security for the price ? I have no " hesitation in adopting the first of these alternatives and rejecting " the second." That is on the particular scope of the agreement with which he was dealing. " The entire deed seems to me redolent " of the granter's desire to keep the business under the control of " his trustees until the whole of his capital and interest has been " paid out. Till then the employees are to have no vested interest, " and are to have nothing to sell or convey. Till then they are " not to touch a shilling of the profits except the small percentage, " which is much more appropriate to active management by a " servant than to the position of a principal." I think the facts of that case are different. I find at the top of page 389 Lord Stormonth-Darling added : " Here the King has had his tax upon it in the " hands of R. & J. Dick, and when the Crown demands that the " appellant's presumptive share of these profits shall be reckoned " as part of his individual income, the Crown must shew that the " share is not presumptively or contingently, but actually and " indefeasibly, his." I must read those words as directed to that case. If those last few words are to be read widely and as referring to any case, it seems to me that they would overrule that which Mr. Justice Channell decided in the case of *Smyth v. Stretton*, to which I have referred already, but I think it is clear, if one reads further in Lord Stormonth-Darling's decision, that he was not intending to do that ; indeed, he was agreeing with it. I think in

(1) 5 T.C. 36.



(Singleton, J.)

the circumstances of this case I am bound by the decision of Mr. Justice Channell, to which I have already referred, that is, that the whole sum set aside each year is a taxable addition to the Respondent's salary. The claim of the Crown is to treat those sums as paid not at the date that they are credited, but as paid and assessable as at the date of the ultimate amount of securities being handed over to the Respondent. As I have said already, I should have had much greater difficulty in coming to a conclusion in this case if I had not had the decision of Mr. Justice Channell. It seems to me that I ought to follow that decision in the circumstances of this case. I do not find myself able to distinguish it. The result is that this appeal will be dismissed with costs.

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The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Romer and Maugham, *L.JJ.*) on the 2nd and 3rd July, 1935, and on the latter date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, *K.C.*) and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. Raymond Needham, *K.C.*, and Mr. F. Heyworth Talbot for the Respondent.

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#### JUDGMENT

**Lord Hanworth, M.R.**—This case involves consideration of an agreement and certain facts which have given rise to an additional assessment to Income Tax being made upon the Respondent to the appeal, Mr. Roberts, in the sum of £1,639 for the year ending 5th April, 1928. Mr. Roberts was in the employ of W. T. Henley's Telegraph Works Company, Limited. He entered that employment under an agreement made with them on the 26th August, 1921. His salary was £425 per annum. He has been taxed in respect of that salary. In September of 1927, with the Company's assent, he resigned from the service of the Company. At that date the trustees handed over to him some investments in the shares of the employer company, Henley's Telegraph Works Company, the current value of which at the time they were handed over was £1,640. It is claimed by the Crown that the additional assessment which they have made upon him in respect of that sum ought to be allowed, but the Commissioners who heard the case came to the conclusion that he was only to be assessed in the sum of £332, a sum which arose in the manner which I will mention in a moment. The Respondent to the appeal is content with that assessment, but he resists the full additional assessment which the Crown claims in respect of the £1,640.

**(Lord Hanworth, M.R.)**

Now liability of some sort is admitted by Mr. Roberts to some extent. I think that is important because I can conceive a somewhat different argument being made. There is a liability admitted of at least £332, but it is disputed that there is a liability of £1,640.

When the agreement was made, payment for services was made and the salary was fixed, and Clause 5 recorded that as an additional inducement beyond the salary, which was payable by equal monthly instalments, there should be a Conditional Fund established, and it is said—I am reading the words of Clause 5—“the Employee shall, subject to the conditions hereinafter set forth, be interested in the said Fund as after mentioned”. The Fund is derived by setting aside out of the net profits of the Company and paying to two trustees “a sum equal to one shilling and sixpence per One hundred pounds on the gross amount which shall be divided amongst the holders of the Preference and Ordinary Shares of the Company as dividend or bonus upon their shares in respect of such financial year and also upon any sum which shall be transferred from the Profit and Loss Account of such year to General Reserve Account”. It will be seen, therefore, that the Fund arises from an uncertain amount estimated according to the amount which is the gross amount divided between the holders of the Preference and Ordinary Shares, whether as dividend or bonus, and any sum reserved which may be transferred from the Profit and Loss account.

The way in which that Fund was to be dealt with is also stated. The employee is not to receive the corpus of the Fund which is year by year set aside for him until after he has been in service with the Company for at least five years. After the expiration of five years and at the expiration of each complete subsequent financial year he is “entitled to receive such part of the capital of the said Conditional Fund ..... as shall at the expiration of each such period have been in the hands of the Trustees for the full period of five years from the date when the same was paid over to them”. He has got to wait five years, and when he has waited five years, or rather six years, he may receive then a sum of the capital which has been in the hands of the trustees for as much as five years, but until five years have elapsed he does not get the right to receive anything of the capital set aside for his benefit. In the case of his being dismissed, or assigning or purporting to assign or create a mortgage or charge on his salary or his interest in the Conditional Fund, or if by operation of law he ceases to be beneficially entitled to this sum, then his interest in the Fund is completely to cease. In the case of his death, or if his service is terminated by reason of the directors' thinking that owing to ill-health he ought not to continue, then in those cases he will get under Clause 8 (C) or (D) what he is entitled to receive, namely, the amount then standing to the credit of the capital account of the Conditional Fund, and that sum is to be paid at a distance of not more than six months from the date of his departure from the service or the date of his death.

**(Lord Hanworth, M.R.)**

In fact what happened was that the Company handed over in respect of this employee a sum which was in 1922 £95 12s. 10d., and in the following year £99 0s. 9d., and so on, all those being sums derived from the source which I have indicated and estimated in the way provided by the agreement. Those sums were invested in the purchase of shares of Henley's Telegraph Company with the dividends upon them, and those dividends the employee was entitled to receive during the financial year. He did receive them and he has paid Income Tax in respect of them. The way in which the matter is dealt with is shown by the two letters which are attached to the Case. I am reading the one of the 12th June, 1925, in which a cheque for £9 3s. 8d. is sent for dividend, less tax, on the 79 Ordinary Shares which were purchased cum dividend by the trustees under the scheme of investing in shares. On the 12th June, 1925, information was given him that there had been set aside for his benefit £252—or £252 10s. I think it is—which, as and when the proper time had elapsed, he would be entitled to receive, and as a matter of fact he did receive. The value of the shares which he was entitled to receive at the current market rate was £1,640. That accrued to him and was transferred to him and handed over to him as actual investments on the termination of his employment.

As I say, some liability is admitted. What is argued on behalf of the subject is that these sums which were set aside year by year were really in their essence additional salary—part of his salary—for each year, and are attributable to his income in each year, that he was liable to pay Income Tax in respect of those sums set aside in each of the years respectively, and that he ought to have been assessed and could have been assessed in respect of those sums although he did not and could not receive them because the five years' period had not elapsed. It is said that these sums formed part of his emoluments in each of those years, and so he was liable in respect of each of them, hence the only emolument of this nature received in the year for which the additional assessment is made upon him, namely, 1927–28, the only sum which has been received in that year, was £331 14s. 2d.—call it £332—and that in respect of that an assessment ought to be made upon him, but no more. The Commissioners and Mr. Justice Singleton have both felt themselves bound by the decision in the case of *Smyth v. Stretton*, 5 T.C. 36. That was a case in which certain sums were set aside for the assistant masters at Dulwich College. All the assistant masters were required to be members of the fund, and there was to be an addition to the salaries which they were paid according to the scale which is set out on pages 38 and 39 of 5 T.C. They were called increases of salaries, and paragraph 4 of the Scheme says this: "That the whole  
"of the above increases of salary shall not be paid to the Masters,  
"but shall be retained by the Governors and accumulated at com-  
"pound interest for the purpose of forming the said Provident

**(Lord Hanworth, M.R.)**

“Fund, but subject to the Provisions hereinafter contained.” I quite agree it is not right to treat the effect of this provision as falling on one side or the other, according to whether it may be called, in the terms drawn up, an additional salary or otherwise. One has got to look at what is its essence and to ask oneself whether it was an additional salary or an emolument which is, as is now claimed, an emolument that became due in the successive years and in respect of which the subject was liable to tax. The reason that emphasis is laid upon the year in which the sum accrued due is this : Schedule E is the Schedule which applies for the purpose of taxation of a salary received under circumstances such as these, and Rule 1 of the Rules applicable to Schedule E of the Income Tax Act, 1918, says this : “Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment.” Rule 5, which deals with additional assessment, enables an additional assessment to be made so that in respect of “any additional salary, fees, or emoluments beyond the amount for which an assessment has been made upon him, or for which at the commencement of that year he was liable to be charged, an additional assessment shall, as often as the case may require, be made upon him in respect of any such additional salary, fees or emoluments, so that he may be charged in respect of the full amount of his salary, fees or emoluments for that year”.

Do the facts of this case bring it within the decision of *Smyth v. Stretton*<sup>(1)</sup> or not ? Are those sums appropriated year by year ? Are they sums which are paid by way of additional salary and which, although they cannot be immediately enjoyed by the employee, are none the less his salary deferred until the lapse of six years ? I have come to the conclusion, not I confess without some doubt, that this is an emolument which accrued and was payable not in each successive year, but in the sixth year, and was to be paid when it was handed over in 1927 and not before. It is quite true that a proportion of this amount might have been paid *ex gratia* by the employers if death had supervened, or if under Clause 9 he had been deemed unfit to go on with his service. Taking the normal course, he was not entitled to anything until the lapse of six years, and his right could have been entirely defeated by the events which are tabled in (A), (B) and (C) of Clause 10 of the agreement.

Now ought we to treat this as of the nature of a deferred emolument due to the services rendered, but absolutely due under the contract with him in respect of which he had as much right to be paid as he had a right to be paid his salary of £425 a year, which in fact was

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(1) 5 T.C. 36.



(Lord Hanworth, M.R.)

paid to him monthly? It really comes back to a question of fact and the interpretation of the agreement. In the case of the Dulwich masters <sup>(1)</sup> I think the facts are simple. They would have been paid a larger sum but for the fact that the Governors intended and decided to start this fund, which was for the purpose of securing the benefits to them as and when they reached a certain age, and then it was what they called a contributory scheme, to which they were bound to contribute; it was a deduction from their salary. In the present case I think the facts seem to be in accord with the statements made. Clause 6 seems to indicate that there is no right of the employee to be paid if there are no dividends, or if there is no sum put to reserve; in such circumstances the 1s. 6d. per hundred pounds would not be provided. That all depends upon the will and the discretion of the directors. It is difficult to say that there has been a contractual undertaking on the part of the directors to pay not only the £425 but also these further sums. It seems to me that the agreement does correctly interpret the position of the employee when it says that "subject to the conditions herein—after set forth, (he shall) be interested in the said Fund as after mentioned". That being so, it appears to me that it would be wrong to treat this case as coming within the principle of *Smyth v. Stretton*, a principle which no doubt is quite clear and is illustrated by the decision in that case. It seems to me that the facts in this case stand apart from that principle, and that under these circumstances there could not be said to have accrued to this employee a vested interest in these successive sums placed to his credit, but only that he had a chance of being paid a sum at the end of six years if all went well. That chance has now supervened, and he has got it by reason of the fact of his employment, or by reason of his exercising an employment of profit within Schedule E. Under those circumstances he has been paid what is of the value of £1,640. I do not think that, if one is not able to say that his interest accrued year by year, one can take any other course than to say that what he was ultimately paid was the value of what was handed over to him. Whether in the course of five years the securities or investments had improved in value or not, what was handed over to him was the investments; and their value, which was transferable to him at the end of the period, at the time when he became entitled to receive it, was of the value of £1,640 and not less.

For these reasons, it appears to me that *Smyth v. Stretton* does not govern the case, but it is a case which stands apart from that principle, and that the appeal ought to be allowed and the case sent back to the Commissioners for the assessment to be made at the figure of £1,640—I think it is £1,639, and I suppose there were some shillings and pence which made it either £1,639 or £1,640. The appeal, therefore, is allowed with costs.

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(1) 5 T.C. 36.

**Romer, L.J.**—I agree.

It is plain that Mr. Justice Singleton in deciding this case against the Crown felt himself constrained to do so by the decision of Mr. Justice Channell in the case of *Smyth v. Stretton*, 5 T.C. 36. But if that case be carefully examined, it will be found that it is no more than an illustration of a well-established principle, the principle being this, that for the purposes of taxation of a man's income it matters not what the man has thought fit to do in the way of spending that income or investing it. Mr. Justice Channell had to deal with certain sums by which the salary of a master at Dulwich School had been increased under the scheme which will be found set out on page 38 of 5 T.C., and what he had to decide was whether those increases of salary were to be treated as having been received by the master in each year of his service, and then a portion of the salary handed back to the Governors for the purpose of investment in accordance with the scheme, or whether those sums were to be treated as never having been received by the master as salary or otherwise until under the scheme accumulations of those sums or part of those accumulations were handed over to the master. That that was the point in the case is quite apparent from the arguments that were addressed to the learned Judge. The Solicitor-General at that time commenced his argument as follows<sup>(1)</sup>: "The Provident Scheme merely provides a particular way of investing a portion of the salaries of the Assistant Masters." Mr. Danckwerts, on the other hand, in his argument said this<sup>(2)</sup>: "The fund is not a part of the income of the Masters, as it would be if it were formed of contributions by them." In other words, the Crown was saying that these masters must be treated as having received an increase of salary and then under the scheme paying back the increase to the Governors for the purpose of investment and in accordance with the Provident Fund. Mr. Justice Channell stated the case that he had to decide as follows<sup>(2)</sup>: "It seems to me to depend upon this. Here is a Scheme established by the Governors of Dulwich College, and the question is whether the true effect of that Scheme is to increase the salaries of the Assistant Masters, imposing at the same time an obligation upon them to deal with a portion of the increased salaries in a certain way"—that was what the Crown contended—"whether that is the true effect of the Scheme or whether the true effect of the Scheme, when you look at the substance of it, is not really to increase the salaries but to give to the Masters upon their ceasing to hold the position of Assistant Masters, gratuities or allowances." Now the learned Judge, for reasons which seemed sufficient to him, came to the conclusion that the increases of salaries, both under paragraph 1 (a) and (b) of the Scheme as well as the increases of salaries under paragraph 1 (c) of the Scheme, were to be treated as sums paid by way of increase of salary to the master in each year, and handed back

(1) 5 T.C., at p. 40.

(2) *Ibid.*, at p. 41.

**(Romer, L.J.)**

by him to the Governors for the purpose of being dealt with in accordance with this Scheme. I am not going to read any more of the judgment, but the more it is read, the more apparent it will be that that was the point which the learned Judge was to decide. One can hardly say that that case, being merely a question of the construction to be put upon a particular agreement, is any authority which helps us when we are endeavouring to put a proper construction upon an agreement which is totally different from the agreement with which Mr. Justice Channell had to deal. All I can say is that in my opinion it is impossible to say on this agreement with which we have to deal here that Mr. Roberts can be treated as receiving in each year by way of increase of salary sums that were set aside by the Company and handed back to the Company to be invested in shares. If an employer agrees to pay his employee a salary of so much a year and agrees that when the employee leaves the service or is dismissed he shall receive, say, a lump sum of £500 in addition, it is impossible to say that that £500 is an emolument in respect of any year other than the last year of service. As I read this agreement, and reading it in the terms of what in fact happened, it appears to me that it amounts to this. The Company agreed to pay to the employee during his service his salary at the rate of £425 per annum, but agreed "as an additional inducement to "the Employee more effectively to perform his duties and assist in "promoting and advancing the interests of the Company" that the Company would in the year 1927 pay him the sum of £1,639. That being so, it seems to me clear that the £1,639, though in truth an emolument of the office held by Mr. Roberts, was an emolument for the year in respect of the year 1927, and cannot be treated as made up of a series of emoluments for the preceding years.

For these reasons, which are in substance those given by the Master of the Rolls, I think this appeal succeeds.

**Maugham, L.J.**—I am of the same opinion.

It seems to me that if, following the example of Mr. Justice Channell which has been already referred to, I were to attempt to define the question to be determined, I should define it somewhat in this way. The question is whether on the true effect of the agreement dated 26th August, 1921, it may be said that the effect as regards Clauses 6 to 10 was to increase the salary of Mr. Roberts with an obligation imposed upon the trustees to deal with this increase of salary year by year in a specified manner, or whether it was in order to give Mr. Roberts, as the agreement itself says, an interest in the success and prosperity of the Company. The true nature of the agreement was that he was to be entitled in the events, and only in the events mentioned in Clause 8 of the agreement, to the investments made by the Company out of the net profits of the Company as provided in Clause 6. If that is the true nature of the agreement, as I think it



**(Maugham, L.J.)**

is, and the true nature of the question to be determined, my opinion, agreeing with my brethren, is that the latter is the proper conclusion at which this Court should arrive. *Smyth v. Stretton*, 5 T.C. 36—a case, I agree, bearing in some respects a remarkable resemblance to the present case—was before Mr. Justice Channell, and he came to the other conclusion. He based himself a great deal upon the fact that the sums in question there, the emoluments in question, were to be treated and described as increases of salary, and on certain other circumstances. In the present case the sums in question, so far from being called increases of salary, are by the terms of the agreement distinguished from salary, since the salary is mentioned in Clause 5 of the agreement as being a salary at the rate of £425 per annum, and the sums to be set aside out of the net profits of the Company are not described as salary at all, and, therefore, distinguished from salary. In the second place it seems to me not immaterial to observe that the advantages which are being provided for Mr. Roberts are purely advantages to be derived out of the net profits of the Company and depend upon the gross amount of profit which shall be divided among the holders of Preference and Ordinary Shares of the Company as dividend or bonus upon their shares in respect of each financial year. So the sums in question are conditional upon the success from the profit-earning point of view of the Company. Next it is to be observed that Mr. Roberts had only a conditional right, that is to say, a right as given to him conditionally upon the events mentioned in Clause 8 of the agreement being complied with, to receive the investments which might be made on his behalf at times and in the manner therein mentioned. If all those circumstances are taken into consideration I think that it results in this, that the benefits which he might conditionally become entitled to under the agreement are not in a true sense part of the salary in the wide sense chargeable under Schedule E of the Income Tax Act.

Accordingly I think the judgment under appeal, which Mr. Justice Singleton apparently pronounced with considerable hesitation as to whether it was the right conclusion, ought to be reversed, with the consequences mentioned by the Master of the Rolls.

**Mr. Hills.**—With costs here and below ?

**Lord Hanworth, M.R.**—Yes.

**Mr. Needham.**—I am instructed to ask whether your Lordships consider this is a proper case to give us leave to appeal to the House of Lords ?

**Lord Hanworth, M.R.**—Are there any number of cases depending upon this ?



**Mr. Needham.**—There are a number of cases, my Lord ; I do not know what number. The appeals are those of other employees who have been assessed on the footing of Mr. Justice Singleton's decision and have appealed. Other employees of the Company who have been assessed as the result of Mr. Justice Singleton's decision have appealed and those assessments are still under appeal. Contrary to the views of the Crown they were assessed in consequence of what Mr. Justice Singleton said.

*(Their Lordships conferred.)*

**Lord Hanworth, M.R.**—Mr. Needham, we have carefully considered this and we do not think that there is any general principle involved. We think it is not a case for leave to appeal.

**Mr. Needham.**—If your Lordship pleases.

[Solicitors :—Solicitor of Inland Revenue ; Linklater & Paines.]

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