COURT OF SESSION (FIRST DIVISION)—12TH, 16TH AND 19TH DECEMBER 1969

HOUSE OF LORDS—26TH, 27TH AND 28TH OCTOBER AND 8TH DECEMBER 1970

Commissioners of Inland Revenue *v.* Brander & Cruickshank[1]

Income tax, Schedule D—Profits of profession—Law agents—Also acting as secretaries and registrars of companies—Compensation for loss of registrarships—Whether receipt of profession—Whether registrarships offices.

The Respondents were a firm of law agents, conducting a substantial general legal business and also acting as secretaries and/or registrars to some 30 *or* 40 *companies. Apart from directors' fees received by the partners under deduction of tax, their net receipts from all sources, including secretarial salaries and registrars' fees, were assessed to income tax under Case* II *of Schedule D. Half the firm's income, apart from directors' fees, came from their work as secretaries. They had not set out as professional registrars and their registrarships were incidental to their primary business as law agents and secretaries. Until* 1965, *when the companies were taken over by U Ltd., they had been secretaries and registrars of H Ltd. from* 1935 *and its wholly-owned subsidiary D Ltd. from its formation (and their senior partner had been a director of H Ltd. from* 1935). *Their salaries from those companies as secretaries and registrars were* £750 *and* £500*; they spent about two-thirds of their time on the registrarships. Under the terms of the takeover U Ltd. paid them* £2,500 *as compensation for loss of the registrarships. The Respondents had never before received, and did not consider themselves entitled to, payment for the termination of a registrarship; it was only because of a personal friendship between them that the senior partner had felt it proper to raise the matter of an* ex gratia *payment with the director of H Ltd. who negotiated the takeover. The Respondents continued as secretaries for some time after the takeover, as a large amount of work had to be carried out, and resigned voluntarily in September* 1966.

On appeal against an assessment to income tax under Case II *of Schedule D for the year* 1967–68, *the Respondents contended that their appointments as registrars of H Ltd. and D Ltd. were offices and that the said amount of* £2,500 *was exempt from taxation under s.* 38(3), *Finance Act* 1960. *For the Crown it was contended* (inter alia) *that the* £2,500 *was a receipt of the Respondents' profession, that it was not assessable under Schedule E, and that the registrarships were in the nature of agencies and not offices or employments within Schedule E. The Special Commissioners held that the registrarships were offices, and that those offices were not assets of the Respondents' business assessable under Schedule D, since they were not exploited or turned to account nor could they be disposed of in the normal way.*

(1) Reported (C.S.) 1970 S.L.T. 159; (H.L.) [1971] 1 W.L.R. 212; 115 S.J. 79; [1971] 1 All E.R. 36; 1971 S.L.T. 53.

A Held, *that the Commissioners were justified in holding that the registrarships were* (a) *offices within Schedule E and* (b) *not assets of the Respondents' profession, and that the* £2,500 *was not assessable under Schedule D.*

Mitchell *v.* Ross 40 T.C. 11 ; [1962] A.C. 813 *followed ;* Blackburn *v.* Close Bros. Ltd. (1960) 39 T.C. 164 *distinguished.*

Lord Morris considered that, in addition to the Commissioners' reasons B *for holding that the registrarships were not assets of the Respondents' profession, it was also relevant that the Respondents did not regard themselves as entitled to any payment and had only raised the question because of a personal friendship between their senior partner and the director concerned.*

Lords Guest and Upjohn considered that, following Mitchell *v.* Ross, *it would not be legitimate in any event to attribute to Schedule D compensation* C *for the termination of an office within Schedule E.*

Lord Donovan considered that, where the Commissioners found as a fact (as they had not in this case) that a taxpayer had sought an office as part and parcel of his trade or profession, the terminal payments might be regarded as part of the income of the trade or profession, not on the ground that the office was an asset thereof but on the ground that it was a source of profit belonging D *to the trade or profession.*

Lord Reid considered that the Crown's appeal should be dismissed for the reasons given by the rest of their Lordships.

CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland, under the Income Tax Management Act 1964, s. 12(5), and E the Income Tax Act 1952, s. 64.

I. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Edinburgh on 5th and 6th March 1968 for the purpose of hearing appeals, the firm of Brander & Cruickshank (the partners whereof were J. S. R. Cruickshank, J. Graham Fulton, John O. Farquharson, J. Strath Mackenzie, Colin H. Black, Alan W. Baird and R. Scott Brown) F (hereinafter called "the Respondents") appealed against an assessment to income tax for the year 1967–68 in the amount of £26,364.

II. Shortly stated, the question for our decision was whether or not a sum of £2,500, being compensation received on the termination of the Respondents' appointments as registrars to two companies hereinafter mentioned, was assessable to tax.

G III. James Stanley Rowland Cruickshank, the Respondents' senior partner, gave evidence before us.

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

(1) Copy letter dated 17th August 1965 from Robert Lawson & Sons (Holdings) Ltd.

(2) Copy letter dated 17th August 1965 from Unilever Ltd.

H (3) Copy letter dated 2nd February 1966 from the Respondents enclosing schedule of particulars.

(4) Extract from Respondents' profit and loss accounts for years ended 31st May 1957 to 1967.

Copies of the above are annexed hereto and form part of this Case(1). A

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

(*a*) The Respondents were a firm of advocates in Aberdeen, conducting a substantial general legal business and also acting as secretaries and/or registrars to some 30 to 40 companies.

(*b*) Two of the said companies were large investment trusts, for which B the Respondents acted as secretaries and registrars, and also as managers.

(*c*) As secretaries, the Respondents dealt with board meetings and completed the various forms required by the Companies Act. As registrars, the Respondents were responsible for stock registers and preparation of dividend warrants.

(*d*) The Respondents were primarily law agents and secretaries, and had C not set out as professional registrars. Their registrarships were incidental to their business as law agents and secretaries.

(*e*) The following table shows the composition of the Respondents' income (including amounts received in respect of registrarships):

Year ended 31st May	*Directors' fees*	*Secretarial salaries*	*Legal fees*	*Business commissions*	*Total*
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1965 ...	10,393 6 8	24,659 7 10	18,427 13 0	1,672 19 10	55,153 7 4
1966 ...	11,004 0 9	24,803 18 4	21,158 17 1	1,807 12 0	58,774 8 2
1967 ...	11,565 0 0	24,139 12 10	27,005 2 11	1,551 10 8	64,261 6 5

D

Secretaries' salaries were paid without deduction of tax, as the extract from E Respondents' profit and loss accounts for the years ended 31st May 1957 to 1967 produced to us showed. Apart from directors' fees, over the past ten years about half of the Respondents' receipts came from legal work and about half from work as secretaries. Certain partners held directorships in certain companies and received directors' fees, which were paid subject to deduction of tax and included in the partnership income. The Respondents' net receipts F from legal fees, secretarial salaries, managerial fees, business commissions and registrars' fees were assessed to income tax under Case II of Schedule D.

(*f*) Apart from the said two investment companies, most of the companies for whom the Respondents acted as secretary and/or registrar were small, and the Respondents' annual fees in respect of each lay between £20 and £50.

(*g*) Each company accounted for its own routine expenses, which included G costs of stationery, postage and telephone. The Respondents employed and paid their own legal and secretarial staff engaged on company work; they also provided and bore the cost of their own office accommodation.

(*h*) The Respondents' appointments as secretaries and registrars were not reviewed annually or at any other time by the board of each company. The Respondents carried on the work involved from year to year, and H periodically their salaries were increased.

(*i*) At some date prior to 1932 two brothers called Lawson had gone to Aberdeen to start business in a derelict factory. They had sought the help of the Respondents' then senior partner, Mr. Brander, who negotiated a bank loan of £5,000 for them. Mr. Brander nursed them along and became friendly with them. Their venture prospered and was turned into a private company, I

(1) Not included in the present print.

which in about 1935 became a public company now known as Robert Lawson & Sons (Holdings) Ltd. (hereinafter called "Holdings"). The Respondents were appointed secretaries and registrars to Holdings. In 1953 the subsidiary company Robert Lawson & Sons (Dyce) Ltd. (hereinafter called "Dyce") was formed, and thereafter the Respondents acted as secretaries and registrars to both companies. There was no written agreement of appointment in either case. Salaries were fixed from time to time at board meetings. Throughout the period from 1935 until 1965 Mr. Cruickshank, the Respondents' then senior partner, was a director of Holdings.

(*j*) In 1965 an approach was made to the directors of Holdings by Unilever Ltd. with a view to a takeover. Most of the shares in Holdings were held by the Lawson family, who were in favour of the project. At an early stage it was pointed out to the Respondents that in the event of a takeover they would be relieved of their secretaryships and registrarships, but the matter of any payment to the Respondents was not raised until a late stage. Eventually Mr. Cruickshank raised the matter with a director of Holdings, Mr. Frank Lawson, who was negotiating with Unilever Ltd., and in particular with Lord Trenchard, chairman of Wall & Sons (Meat Products) Ltd., a subsidiary of Unilever Ltd. Towards the end of the said negotiations the Respondents as secretaries had prepared draft takeover documents, leaving blank spaces where amounts of compensation could be inserted.

(*k*) When the time came for the said blanks to be filled in, Lord Trenchard had inquired of Holdings what was the Respondents' remuneration as secretaries and registrars, and how their time was divided between their respective duties, as it was intended that the Respondents should continue as secretaries. Lord Trenchard was informed that the Respondents' salaries were £750 and £500 and that they spent about two-thirds of their time on the registrarships. Lord Trenchard suggested a figure of £2,500 verbally by telephone, which was accepted without discussion. Eventually the amount of £2,500 was entered in the said blank spaces, and the relevant paragraphs in the letters dated 17th August 1965 read as follows:

(i) Letter dated 17th August 1965 from Unilever Ltd., to the shareholders of Holdings:

> "It is not proposed in connection with these Offers that any payment or other benefit shall be made or given to any Director of Lawson as compensation for loss of office or as consideration for or in connection with his retirement from office except (subject to the Offer for the Ordinary Shares becoming unconditional) the sum of £2,500 each to Mr. J. S. R. Cruickshank and Mr. Robert A. Gray. In the event of the Offer for the Ordinary Shares becoming unconditional Messrs. Brander & Cruickshank (of which Firm Mr. J. S. R. Cruickshank is a Partner) will cease to act as Registrars of Lawson and will be paid the sum of £2,500 in connection with the termination of such office."

(ii) Letter dated 17th August 1965 from Holdings to its members:

> "Unilever has informed your Directors that in the event of the Offer for the Ordinary Shares becoming unconditional it is intended that the business of your Company should be continued and expanded along existing lines under the direction of the Lawson family and existing management, except that Mr. Robert A. Gray and Mr. J. S. R. Cruickshank will retire from the Board and, subject to the sanction of

your Company in General Meeting, will be paid £2,500 each by way of compensation for loss of office. It is also proposed to pay Messrs. Brander & Cruickshank, who have been Secretaries and Registrars to your Company since its formation in 1953 and to its Dyce subsidiary for fully 28 years (and who will be continuing as Secretaries to both Companies), the sum of £2,500 upon the termination of their appointments as Registrars; Mr. Cruickshank is a partner of the said firm. Members will receive with this letter Notice convening an Extraordinary General Meeting of your Company for 2nd September, 1965, at which a Resolution will be submitted to approve the proposed payments of compensation to Mr. Gray and Mr. Cruickshank subject to the Offer for the Ordinary Shares becoming unconditional. Save as indicated above and in the enclosed letter from Unilever, there are no agreements or arrangements between any of your Directors and any other person in connection with, or conditional upon, the outcome of the Offers."

(*l*) A month or so after the said takeover the Respondents as secretaries of Holdings and Dyce paid themselves as registrars the sum of £2,500. The Respondents had never previously received payment for termination of a registrarship and considered that they had no entitlement to such. It was only because of the personal friendship between Mr. Cruickshank and Mr. Frank Lawson that the former had felt it proper to raise the matter of an *ex gratia* payment.

(*m*) After the said takeover the Respondents continued as secretaries of Holdings and Dyce, as a large amount of work had to be carried out. They voluntarily resigned their secretaryships in or about September 1966.

(*n*) In addition to their salaries as secretaries and registrars the Respondents had received from Holdings and Dyce normal fees for any legal work undertaken.

VI. It was contended on behalf of the Respondents:

(*a*) that the Respondents' appointments as registrars of Holdings and Dyce were offices;

(*b*) that the said amount of £2,500 paid as compensation on termination of the said offices was exempt from taxation under s. 38(3) of the Finance Act 1960;

(*c*) that such amount was not otherwise assessable under Schedule D; and

(*d*) that the appeal should succeed.

VII. It was contended on behalf of the Commissioners of Inland Revenue:

(*a*) that the compensation of £2,500 received on termination of the Respondents' appointments as registrars of Holdings and Dyce was a trading receipt and properly included in the firm's profits assessable under Case II of Schedule D;

(*b*) that the said compensation was not assessable under Schedule E;

(*c*) that there was in the circumstances no office of registrar receipts from which were assessable under Schedule E;

(*d*) that the said appointments were like agencies, and not offices or employments within Schedule E ;

(*e*) that the said appointments were accepted by the Respondents in the course of carrying on their composite business or profession as solicitors, managers, secretaries and registrars ;

(*f*) that the said compensation was not compensation for damage to the whole structure of the Respondents' profession ;

(*g*) that the said compensation was not exempt from income tax by virtue of s. 38(3) of the Finance Act 1960 ; and

(*h*) that the appeal should be dismissed.

VIII. The following cases were cited by the parties: *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue* 21 T.C. 608 ; 1938 S.C. 238 ; *McMillan* v. *Guest* 24 T.C. 190 ; [1942] A.C. 561 ; *Anglo-French Exploration Co. Ltd.* v. *Clayson* 36 T.C. 545 ; [1956] 1 W.L.R. 325 ; *Blackburn* v. *Close Bros. Ltd.* (1960) 39 T.C. 164 ; *Mitchell* v. *Ross* 40 T.C. 11 ; [1962] A.C. 813 ; *Ellis* v. *Lucas* 43 T.C. 276 ; [1967] Ch. 858.

IX. We, the Commissioners who heard the appeal, after considering the evidence adduced and the arguments addressed to us, gave our decision orally as follows:

The issue raised two questions, the first of which was whether the Respondents' appointments as registrars were offices. Taking as our guide the passage from Lord Atkin's speech in *McMillan* v. *Guest* 24 T.C. 190, at page 201, we found that the appointments constituted offices. We did not accept the Crown's argument that because the appointments (unlike those of company secretaries) were not recognised by the Companies Act 1948 they were not offices. In our view " office " was a wide term. The companies for which the Respondents acted in fact created the offices, and as offices they were so regarded : see, for instance, the offer from Unilever Ltd. dated 17th August 1965.

The second question was whether, notwithstanding that emoluments of an office were taxable under Schedule E, compensation for termination was nevertheless assessable under Schedule D. In our view the offices in question—the registrarships to Holdings and Dyce—were not assets of the Respondents' business assessable under Schedule D. While the offices might loosely be described as assets, in the sense that they were acquired incidentally in the course of the Respondents' profession as advocates, they were not in our view trading assets. These offices were not exploited or turned to account ; further, they could not be disposed of in the normal way.

Accordingly we held that the appeal succeeded and we left figures to be agreed between the parties.

X. Figures were agreed between the parties on 3rd June 1968, and on 5th July 1968 we reduced the assessment to £23,564.

XI. The Commissioners of Inland Revenue immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, which Case we have stated and signed accordingly.

XII. The question of law for the opinion of the Court is whether on the facts found by us we were entitled to hold:

(1) that the Respondents' appointments as registrars of Holdings and Dyce were appointments to offices ; A

(2) that the sum of £2,500 paid to the Respondents as compensation on the termination of their appointments as registrars was not assessable under Schedule D.

Basil James
H. G. Rowland } Commissioners for the Special Purposes of the Income Tax Acts. B

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19th June 1969.

The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Guthrie and Migdale) on 12th and 16th December 1969, when judgment was reserved. On 19th December 1969 judgment was given unanimously against the Crown, with expenses. C

W. A. Elliott Q.C. and *W. D. Prosser* for the Crown.
G. W. Penrose for the Respondents.

The following cases were cited in argument in addition to those referred to in the judgments :—*Elliott* v. *Guastavino* (1924) 8 T.C. 632 ; *Blackburn* v. *Close Bros. Ltd.* (1960) 39 T.C. 164 ; *Edwards* v. *Bairstow* 36 T.C. 207 ; [1956] A.C. 14 ; *Kelsall Parsons & Co.* v. *Commissioners of Inland Revenue* 21 T.C. 608 ; 1938 S.C. 238 ; *Salisbury House Estate Ltd.* v. *Fry* 15 T.C. 266 ; [1930] 1 K.B. 304 ; *Commissioners of Inland Revenue* v. *MacDonald* (1955) 36 T.C. 388. D E

The Lord President (Clyde)—The question in this appeal is whether a sum of £2,500, which represents compensation received on the termination of the Respondents' appointments as registrars to two companies on their being taken over by a third company, is assessable to tax under Case II of Schedule D. The Special Commissioners have answered this question in the negative, and the Crown have appealed against this decision. F

The Respondents are a firm of advocates in Aberdeen carrying on a substantial general legal business for private individuals and limited companies. Although they act as secretaries to several of these limited companies, they do not hold themselves out as professional registrars. They have for a long number of years acted as advisers to two brothers Lawson, whose business gradually increased from practically nothing until it was turned into a private, G and in 1935 into a public, company known as Robert Lawson & Sons (Holdings) Ltd. In 1953 a subsidiary company, Robert Lawson & Sons (Dyce) Ltd., was formed. Since this latter date the Respondents acted as secretaries and registrars to both companies, carrying out the duties imposed on secretaries by the Companies Acts and also the duties of making up the stock registers and preparing the dividend warrants as envisaged by s. 110(2)(*b*) H of the Companies Act 1948. There was no written agreement of their appointments and the salaries to be paid to them were fixed from time to time at board meetings of the companies.

(The Lord President (Clyde))

A In 1965 Unilever Ltd. acquired all the shares in the two companies, and it was a term of the takeover that the Respondents would cease to be registrars of both companies and that on their so ceasing they would receive a sum of £2,500. The Respondents continued to act as secretaries of the companies after the takeover, as a large amount of work had still to be carried out in connection therewith. The Respondents resigned their secretaryships in B September 1966. The Crown now seek to include in the Respondents' assessment to income tax under Schedule D for the year 1967–68 the above-mentioned sum of £2,500.

Section 37 of the Finance Act 1960 *inter alia* provides:

> " (1) Subject to the provisions of this and the next following section, income tax shall be charged under Schedule E in respect of any payment C to which this section applies which is made to the holder or past holder of any office or employment . . . whether made by the person under whom he holds or held the office or employment or by any other person. (2) This section applies to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, D or otherwise in connection with, the termination of the holding of the office or employment."

Section 38 provides for exemptions in respect of tax under s. 37, and s. 38(3) provides that tax shall not be charged in virtue of the last foregoing section in respect of a payment of an amount not exceeding £5,000.

The first question in the case is whether the Respondents' appointments E as registrars of the two companies which were taken over by Unilever Ltd. constituted offices within the meaning of that word in s. 37 of the 1960 Act. It is probably impossible, and it would certainly be unwise, to try to lay down any comprehensive definition of what constitutes an office. As Lord Wright said in *McMillan* v. *Guest*[1] [1942] A.C. 561, at page 566:

> " The word ' office ' is of indefinite content. Its various meanings F cover four columns of the New English Dictionary, but I take as the most relevant for the purposes of this case the following: ' A position or place to which certain duties are attached, especially one of a more or less public character.' "

The word seems to point to a distinction between the case where the selected person is appointed to a position where he must perform a certain type of G work, rather than a person who is instructed to carry out a particular task: compare *Great Western Railway Co.* v. *Bater*[2] [1922] 2 A.C. 1.

In the present case the duties of a registrar clearly fall into the former category, and the position which he holds is therefore an office within the meaning of the section. This is the conclusion to which the Special Commissioners came, and in my opinion they were on the facts they found entitled so H to hold. The Respondents were entrusted with the task of performing the statutory duty to keep the companies' registers, and in that situation the Respondents were in my opinion in the position of holders of an office. Their duty had to be performed from time to time when the shareholders' register required to be altered, and their salaries were paid from year to year. On these facts the Special Commissioners were therefore entitled to hold that the I appointments in question were appointments to offices within the meaning of s. 37 of the 1960 Act. The payment of £2,500 was compensation on the ter-

(1) 24 T.C. 190, at p. 202. (2) 8 T.C. 231.

(The Lord President (Clyde))

mination of these offices as registrars. Sections 37 and 38 were accordingly applicable, and the exemption provision in s. 38(3) was properly invoked by the Respondents.

It was contended for the Crown that, as the office of registrar was merely part of the Respondents' trading activity as solicitors, it was taxable under Schedule D and not under Schedule E. From this it follows that the payment in question was not a " payment (not otherwise chargeable to income tax) " within the meaning of s. 37(2) of the 1960 Act. But in my opinion this contention is unsound. It is a question of fact for the Special Commissioners whether the receipts from the office of registrar do or do not form part of the profits of a trade or profession. The Courts will not interfere with that conclusion in fact unless the Commissioners had no material upon which they could reasonably so hold: see *Ellis* v. *Lucas*[1] [1967] Ch. 858. In the present case the Special Commissioners have decided this issue in the Respondents' favour, and I see no reason to hold that they were not entitled to do so. In *Mitchell* v. *Ross*[2] [1960] Ch. 145 a question arose as to whether medical specialists who had National Health appointments and also carried on a private specialist practice were assessable in respect of the former appointments under Schedule D or Schedule E. As Upjohn J. said, at page 168[3]:

> " Once the conclusion is reached that the National Health appointment is the holding and exercise of an office (and that is the vital decision), the expenses attendant thereon must be deducted under the rules applicable to Schedule E and, in my judgment, under no other Schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter the position."

Upjohn J.'s judgment was upheld and approved in the House of Lords, [1962] A.C. 813[4].

The facts in the present case amply justify the conclusion on fact in this matter to which the Special Commissioners came. The Respondents are law agents, and it is found in the Case that they had not set out as professional registrars. The obtaining of registrarships is not part of the ordinary work of a solicitor, nor was it part of the professional activities of the firm. It would only be in this latter event that the obtaining of registrarships could be part of the professional activity of the Respondents. There are no facts found to warrant any such inference. On the contrary, it appears clear in the present case that these registrarships were not assets of the Respondents' trading business at all, but separate offices in respect of which Schedule E and not Schedule D is the appropriate Schedule.

In my opinion the Special Commissioners reached the correct conclusion and the questions put to us should both be answered in the affirmative.

Lord Guthrie—The question raised in this case is whether a sum of £2,500 paid to the Respondents as compensation on the termination of their appointments as registrars to two companies was assessable to income tax for the year 1967–68.

In order to decide this question it is necessary to consider whether this sum was compensation for loss of offices, since the Respondents maintain that as such it would have been assessable under Schedule E of the Income Tax Act 1952 in virtue of s. 37 of the Finance Act 1960, but was exempt from taxation under s. 38(3) of the latter Act, being under £5,000. For the Crown it is

(1) 43 T.C. 276. (2) 40 T.C. 11. (3) *Ibid.*, at p. 37.
(4) *Ibid.*, at p. 57.

A contended that the registrarships of these two companies were not offices, but that, in any event, the payment was a trading receipt of the Respondents in respect of their profession or business of solicitors, company secretaries, managers and registrars, and therefore assessable under Schedule D, so that it did not fall under s. 37, which only applied to payments not otherwise chargeable to income tax.

B In my opinion the question whether the registrarships were offices or not is one which is largely dependent on the circumstances of the particular case. Accordingly it is a matter on which this Court would not interfere with the decision of the Special Commissioners unless they had misdirected themselves in law, or had not material in the facts found which entitled them to reach their conclusion. The Special Commissioners addressed themselves to the C proper legal issue by taking as their guide the well-known dictum of Rowlatt J. in *Great Western Railway Co.* v. *Bater*(1) [1920] 3 K.B. 266, at page 274, approved by Lord Atkin in *McMillan* v. *Guest*(2) [1942] A.C. 561, at page 564. They therefore inquired whether the registrarship was "a subsisting, permanent, substantive position which had an existence independent of the person who filled it". I think that their findings in fact entitled them to D return an affirmative answer. They found that special duties rested on the Respondents as registrars. As such, they were responsible for stock registers and the preparation of dividend warrants. This work was done in the Respondents' own office by their own staff. They were paid yearly salaries by the companies in respect of their work as secretaries as well as registrars. They were appointed registrars on the formation of the principal company as E a public company in 1935, and held the appointment until it was "taken over" in 1965. After a subsidiary company was formed in 1953 the Respondents acted as registrars throughout its whole life until the takeover. Accordingly in both cases there was a permanency about the positions which they held. As the duties attached to the positions, the keeping of the register and the preparation of the dividend warrants, were part of the functioning of the F company, there is no reason to associate the existence of this position with the persons who filled it. For the Crown it was submitted that the Companies Act 1948 recognised in ss. 177 and 159 the offices of secretary and auditor, but that the Act did not recognise an office of registrar, since s. 110 only required a company to keep a register, and that could be done by an employee of the company or other person. Accordingly, the keeping of a register was a task, G not an office. This matter was rightly taken into consideration by the Special Commissioners, but I agree with them that, although the Companies Act does not require the creation of an office of registrar, a company can create such an office with special duties attached to the holder of that office. The question for the Special Commissioners was whether the registrarships in this case were offices of the particular companies, and not whether they were H offices recognised by Statute, to which statutory duties were attached. It was also submitted for the Crown that, as the Respondents acted as registrars not to one or two companies only, but to a large number of companies, they were not holding an office in a company, but carrying on a business as company registrars. Again, I accept that the fact that the Respondents were registrars for many companies was a relevant consideration for the Special I Commissioners. It is more easy to find that a person is the holder of an office when he only holds one such appointment than it is to find that he holds offices when he has a number of similar appointments. But again it seems to

(1) 8 T.C. 231, at p. 235. (2) 24 T.C. 190, at p. 201.

(Lord Guthrie)

me to be a matter of the circumstances of each case. I do not see why a number of companies cannot each create a part-time office with particular duties attached to it and appoint the same person to these offices. What the Special Commissioners had to decide was whether in the particular cases of the two companies the Respondents were holders of substantive positions to which duties were attached, and which had the quality of permanency irrespective of the particular holder's tenure, or whether they merely did some work of a particular kind for the companies. I think that the facts found entitled the Special Commissioners to reach the former conclusion.

On the second matter, whether the payment in question does not fall under s. 37 of the Finance Act 1960 as being otherwise chargeable to income tax, I also agree with the Special Commissioners that it does not. If the registrarships were offices, then the emoluments received by the Respondents as holders of these offices were chargeable under Schedule E of the Income Tax Act 1952 in virtue of s. 156. But the Crown contended that in any event the payment of £2,500 in respect of their retirement from these offices fell under Schedule D as being a trading receipt of the Respondents from their business or profession. Whether this contention is sound or not depends, therefore, on the ascertainment of the business or profession of the Respondents. In *Ellis* v. *Lucas* 43 T.C. 276, at page 289, Ungoed-Thomas J. said:

> " But this does not affect the question whether an office, the emoluments of which are taxable under Schedule E, is capable of being an asset of a trade subject to taxation under Schedule D so as to make compensation for loss of that asset also accountable to tax under Schedule D. In my view the answer to that question is ' Yes '. It is a question depending on the facts in each case, be the taxpayer a company or an individual, whether the office is an asset of the trade or (as in the case of the Respondent's activities) business of an accountant."

On this matter we have in the present case a definite finding in fact by the Special Commissioners in these terms:

> " The Respondents were primarily law agents and secretaries, and had not set out as professional registrars. Their registrarships were incidental to their business as law agents and secretaries."

If it is accepted that the registrarships were offices, then this finding means that registrarships were not part of the business of the Respondents, but were incidental to it in the sense that their profession qualified them to perform the duties of the offices, and, together with their association with the companies, rendered them suitable for appointment to these offices and led to such appointment.

The case of *Mitchell* v. *Ross*[1] [1962] A.C. 813 seems to me to be adverse to the contention for the Crown in the present case. In that case Dr. Ross was by profession a radiologist, who carried on practice as such, but who also held an office under a part-time appointment under the National Health Service. It was held that the profits arising from the appointments were assessable under Schedule E, not Schedule D, and that the expenses attendant upon the exercise of the office must be deducted under the rules applicable to Schedule E, and not under the rules of any other Schedule. Lord Radcliffe said, at page 839[2]:

> " So far as I can see, the proposition that the respondents wish to maintain would be just the same if there had been a finding to the effect

(1) 40 T.C. 11. (2) *Ibid.*, at p. 62.

A that Dr. Ross, for example, carried on the profession of a consultant radiologist and that it was a reasonable and proper incident of that profession to hold a part-time appointment under the National Health Service. However that may be, I regard the finding as irrelevant to the decision of the case, once it is accepted that the scheme of the tax code necessitates mutual exclusiveness between 'profession' and 'office' and
B the assessment of their profits by different sets of rules."

In his judgment in the Chancery Division, which was upheld by the House of Lords, Upjohn J. said(1):

> "Once the conclusion is reached the National Health appointment is the holding and exercise of an office—and that is the vital decision —the expenses attendant thereon must be taxed under the Rules applic-
C able to Schedule E and, in my judgment, under no other Schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter that position."

Although the decision related to the deduction of expenses, these passages seem to me to be authority for the view that the mere fact that the holding of an office was an incident of a profession does not justify the conclusion that
D the holding of an office is an asset of the profession or business. In *Ellis* v. *Lucas*(2) the question was whether a payment of £1,125 to the respondent, a practising accountant, as compensation for loss of auditorships of certain companies, was assessable to income tax under Schedule D, or whether it would have been assessable, if at all, under Schedule E, but was exempt from income tax in virtue of s. 38(3) of the Finance Act 1960. It was held by Ungoed-
E Thomas J. that, in default of any finding by the Special Commissioners that the auditorships were an asset of the respondent's business, their decision was correct. The present case seems to me to be *a fortiori* of *Ellis* v. *Lucas*, since in this case a particular finding dealing with the matter is not lacking. The Special Commissioners have specifically found that the registrarships were not assets of the Respondents' business, but were merely incidental to
F that business. It appears from *Mitchell* v. *Ross*(3) that a finding that the holding of an office is an incident of a profession does not infer that the appropriate Schedule for income tax purposes is Schedule D and not Schedule E. On the whole matter I reach the conclusion that the payment in question did not arise and accrue from the Respondents' business or profession, but from an office which was merely incidental to that business or profession.

G Accordingly, for these reasons, I am of opinion that the decision of the Special Commissioners on this matter also is sound.

I would answer both branches of the question of law in the affirmative.

Lord Migdale—The question in this case is whether a sum of £2,500 falls, for income tax purposes, under Schedule D or under Schedule E. The Special Commissioners have held that it falls to be assessed under Schedule E and the
H Crown challenges this decision.

The Respondents carry on business in Aberdeen as advocates. They also acted as secretaries and registrars and managers of some registered companies. Certain partners held directorships. The whole incomings were treated as partnership income and taxed under Case II of Schedule D. The directors' fees were paid under deduction of tax. In 1932 the then senior partner of the
I Respondents' firm helped two clients to start a business which prospered. In

(1) 40 T.C. 11 at p. 37. (2) 43 T.C. 276. (3) 40 T.C. 11.

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1935 it became a public company known as Robert Lawson & Sons (Holdings) Ltd., and a subsidiary company was started in 1953 known as Robert Lawson & Sons (Dyce) Ltd. In 1965 these companies were taken over by Unilever Ltd.

The Respondents had acted as secretaries for these companies and they also kept the share registers. They are described in the Case as registrars of these companies. On the takeover the Respondents ceased to act as registrars of Lawsons, although they continued to act as secretaries. Unilever Ltd., who were acquiring the shares of the company, agreed to pay to the Respondents the sum of £2,500 in connection with the termination of the office of registrar. This sum was paid over a month or so after the takeover. It is this sum which is now under consideration.

The Special Commissioners have found that the Respondents were a firm of advocates conducting a substantial general legal business and also acted as secretaries and/or registrars to some 30 or 40 companies. The Respondents were primarily law agents and secretaries and had not set out as professional registrars. Apart from these two companies the fees received from companies for acting as secretaries and/or registrars were small—from £20 to £50 each.

The Commissioners found that the two registrarships, Holdings and Dyce, were not assets of the Respondents' business assessable under Schedule D. They say:

> " While the offices might loosely be described as assets, in the sense that they were acquired incidentally in the course of the Respondents' profession as advocates, they were not in our view trading assets. These offices were not exploited or turned to account ".

In my view the question whether this sum of £2,500 was a profit or gain arising from the Respondents' profession and so chargeable under Case II of Schedule D or was a payment made to the past holder of an office in consideration of the termination of the holding of that office is to be determined upon a consideration of all the circumstances in the case. There could be cases where a taxpayer—be he an individual, a partnership or a company—sets up a business of keeping registers for a number of companies. In such a case he would, in all probability, be taxed on his profits under Schedule D. If on the other hand, he acted as registrar for one company only, and was paid a salary, he would be assessed in respect of that salary under Schedule E. In between lies a tract of debatable territory. In the present case the question has been carefully considered by the Special Commissioners and they have found that the appointments as registrars were " offices ". There is evidence in the Case to warrant this finding. The companies themselves created the " offices " and regarded them as " offices ". In deciding on the facts the Commissioners say they had in view what Lord Atkin said in *McMillan* v. *Guest*[1] [1942] A.C. 561, at page 564:

> " There is no statutory definition of ' office '. Without adopting the sentence as a complete definition one may treat the following expression of Rowlatt J. in *Great Western Railway Co.* v. *Bater*[2], adopted by Lord Atkinson[3], as a generally sufficient statement of the meaning of the word: ' an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders.' "

(1) 24 T.C. 190, at p. 201. (2) 8 T.C. 231, at p. 235. (3) *Ibid.*, at p. 246.

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A The Respondents kept the registers of these companies. Someone had to do that work. It might have been done by employees of the companies. It was not like giving legal advice on a particular problem as it arose. This work of keeping the registers entailed a position which had an existence of its own. If one holder gave it up someone else had to be appointed to carry it on.

B In my view that is really the end of the matter. The Special Commissioners have found that the position of keeper of the registers was an office. If it is an office it falls under Schedule E. Section 156 of the Income Tax Act 1952(1) provides:

> "Schedule E. Tax under this Schedule shall be charged in respect of any office . . . on emoluments therefrom which fall under . . .
C Case I . . . for the year of assessment".

The payment in question is not an emolument for the year of assessment. But s. 37(1) of the Finance Act 1960 provides that income tax shall be charged under Schedule E in respect of any payment which is made to the past holder of any office or employment. Subsection (2) says that this applies to any payment in consideration of or in consequence of, or in connection with, the
D termination of the holding of the office or employment. Section 38(3) provides that tax shall not be charged by virtue of the last foregoing section in respect of a payment of an amount not exceeding £5,000. This payment of £2,500 would appear to fall within these provisions. As it is less than £5,000 it does not attract tax.

Counsel for the Crown contended (1) that keeping the registers was not an
E "office", and (2) that even if it was an office a profit or gain arose to the Respondents and it should be charged with tax under Case II of Schedule D in respect of their "profession". It was conceded that the £2,500 could not be taxed under both provisions. It was also conceded that a taxpayer could be assessed on part of his income under Schedule D and in respect of another part under Schedule E: *Mitchell* v. *Ross*(2) [1962] A.C. 813. In that case Lord
F Radcliffe, at page 839, contrasted liability to tax on activities in pursuit of a profession and activities relating to employment in an office and then said(3):

> "If the activities relating to the employment in the office are excluded, as they must be because they belong to Schedule E, the profession the profits of which are assessable under Schedule D must consist only of the remaining activities."

G This payment was made in consideration of the termination of the holding of an office, so it comes under Schedule E and s. 37 of the Finance Act 1960. It escapes taxation because it is under £5,000.

I have difficulty in following the second contention for the Crown, that, even if payment was made in connection with the termination of the holding of an office, it is taxable under Case II of Schedule D because it was received
H in respect of the Respondents' profession. The finding in the Case is that the Respondents were primarily law agents and secretaries and had not set out as professional registrars. Their registrarships were incidental to their business as law agents and secretaries. This does not mean that the office of registrar was a minor part of their business, but rather that it was something outside their business.

(1) As amended by the Finance Act 1956, s. 10.
(2) 40 T.C. 11. (3) *Ibid.*, at p. 61.

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We were referred to cases where professional persons were taxed under Schedule D such as *Davies* v. *Braithwaite*(1) [1931] 2 K.B. 628 and *Anglo-French Exploration Co. Ltd.* v. *Clayson* 36 T.C. 545 ; [1956] 1 W.L.R. 325, but I do not find them helpful. On the other side, in *Ellis* v. *Lucas*(2) [1967] Ch. 858 an accountant was held to be assessable under Schedule E in respect of a payment on termination of his office. In my view each case must be determined on its own facts. If the payment is connected with an office it is assessable under Schedule E. If on the other hand it is an annual profit or gain arising from the taxpayer's profession it is assessable under Schedule D.

In a series of cases from *Currie* v. *Commissioners of Inland Revenue*(3) [1921] 2 K.B. 332 on, it has been laid down that the question which Schedule applies is a question of fact and Courts should be slow to differ from the Commissioners: see Lord Sterndale M.R., at page 335(4) ; Scrutton L.J., at page 338(5). In the present case I am satisfied that the Special Commissioners arrived at the correct result in finding that these registrarships were " offices ". Even if I had entertained some doubt, I would have accepted their decision because I cannot say they were not entitled to hold as they have done on the facts found by them.

I would answer both branches of the question in the affirmative.

The Crown having appealed against the above decision, the case came before the House of Lords (Lords Reid, Morris of Borth-y-Gest, Guest, Upjohn and Donovan) on 26th, 27th and 28th October 1970, when judgment was reserved. On 8th December 1970 judgment was given unanimously against the Crown, with costs.

W. A. Elliott Q.C. (of the Scottish Bar), *Patrick Medd* (of the English Bar) and *W. D. Prosser* (of the Scottish Bar) for the Crown.

J. P. H. Mackay Q.C. and *G. W. Penrose* (both of the Scottish Bar) for the Respondents.

Elliott v. *Guastavino* (1924) 8 T.C. 632 was cited in argument in addition to the cases referred to in the speeches.

Lord Reid—My Lords, for the reasons given by your Lordships I would dismiss this appeal.

Lord Morris of Borth-y-Gest—My Lords, the Special Commissioners came to the conclusion, on the basis of the facts which they found, that the Respondents' appointments as registrars of Robert Lawson & Sons (Holdings) Ltd. and of its subsidiary company, Robert Lawson & Sons (Dyce) Ltd., were appointments to offices. The Respondents were appointed as secretaries and registrars of both companies. In the case of one company the salary was £750 and in the case of the other it was £500. In regard to the time the Respondents spent as secretaries and registrars of these two companies, one-third of it related to their duties as secretaries and two-thirds to their duties as registrars. When proposals were made for taking over the shares held in the two companies the Respondents were informed that, in the event of a take-over, they would be relieved of their secretaryships and registrarships. The

(1) 18 T.C. 198. (2) 43 T.C. 276.
(3) 12 T.C. 245. (4) *Ibid.*, at p. 259. (5) *Ibid.*, at p. 262.

A arrangement that was later made, when the takeover took place, was that the Respondents should cease to be registrars and should receive £2,500 upon such termination of their appointments as registrars but should continue for some time as secretaries of the two companies. They did so continue for some time and then voluntarily resigned their secretaryships.

A duty is imposed upon a company to keep a register of members: B Companies Act 1948, s. 110. Even though the Companies Act does not require that there should be an appointment as registrar, a company must arrange that some person or persons should on its behalf perform the statutory duties of maintaining its register. In doing so, it may establish a position which successively will be held by different persons. If it does so the company may have created what could rationally for income tax purposes C be called an office. In *McMillan* v. *Guest* (1) [1942] A.C.561 Lord Atkin, while pointing out that there is no statutory definition of "office", was prepared to accept what Rowlatt J. had said in *Great Western Ry. Co.* v. *Bater* (2) [1920] 3 K.B.266 (as adopted by Lord Atkinson (3), [1922] 2 A.C.1, at page 15) as being a generally sufficient statement of meaning. Rowlatt J. had referred to "a subsisting, permanent, substantive position, which had an D existence independent of the person who filled it, and which went on and was filled in succession by successive holders". Lord Wright in *McMillan* v. *Guest* (4) pointed out that regard must be had to the facts of any particular case and to the ordinary use of language and the dictates of common sense. In my view, the Special Commissioners were warranted on the facts as they found them in deciding that the Respondents' appointments as registrars E of the two companies were appointments to offices.

Though in fact the fees which certain partners in the Respondent firm received as directors of certain companies were, by reason of some arrangement that they made between themselves, included in the partnership income and though in fact the Respondents' net receipts from all activities (including legal fees, directors' fees, secretarial salaries, managerial fees, F business commissions and registrars' fees) were assessed to income tax under Case II of Schedule D, I think that it must follow from the decision of this House in *Mitchell* v. *Ross* (5) [1962] A.C. 813 that tax was chargeable under Schedule E on the emoluments in respect of the two registrarships. The payment of £2,500 was clearly made in consideration or in consequence of or otherwise in connection with the termination of the holding of the offices G of registrar: see s. 37(2) of the Finance Act 1960. Unless it was a payment "otherwise chargeable to income tax" it would be a payment in respect of which income tax would be charged under Schedule E (see s. 37(1)) but for the fact that by virtue of s. 38(3) tax is not to be charged in respect of a payment of an amount not exceeding £5,000. So the question arises whether the payment of £2,500 was "otherwise" chargeable to income tax. The H presence of the words "not otherwise chargeable to income tax" in s. 37(2) (unless they were introduced unnecessarily or for reasons of caution) would appear to recognise that there could be payments coming within the words of subs. (2) which, independently of subs. (1), would be chargeable to tax. The words do not necessarily denote chargeability under a Schedule other than Schedule E.

I The contention of the Crown is that the offices were assets of the Respondents' profession or vocation obtained in the course of carrying on

(1) 24 T.C. 190, at p. 201. (2) 8 T.C. 231, at p. 235. (3) *Ibid.*, at p. 246.
(4) 24 T.C., at p. 203. (5) 40 T.C. 11.

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such profession or vocation and that compensation for the loss of those assets should be treated as a receipt of the profession or vocation and taxable under Case II of Schedule D. My Lords, I cannot think that the appointments to the offices of registrar were in any real sense to be regarded as assets of the Respondents in respect of their profession. No question has been raised for decision as to whether, if they were so to be regarded, a payment for the loss of them would be of the nature of a capital rather than of an income receipt. The conception of the assets of a trader in carrying on his trade is one that has reality and clarity. It is difficult in the case of a firm carrying on the profession of advocates conducting a substantial general legal business but who incidentally acquire appointments as registrars of companies to regard such appointments as being "assets" of the firm in their profession. The case here is quite different from that of a trader who might in the course of his trade acquire assets and dispose of them. The case here is quite different on its facts from the case of *Blackburn* v. *Close Bros. Ltd.* (1960) 39 T.C. 164. That was the case of a trader, the profits of whose trade were chargeable under Case I of Schedule D, who had a three-year appointment as secretary and registrar at a substantial remuneration. The agreement was prematurely terminated and a substantial sum was by agreement paid as compensation. It was held that the compensation was chargeable as a trading receipt of a revenue nature and that this was so even though the remuneration under the agreement would have been chargeable under Schedule E. I do not find it necessary to express any opinion in regard to that case. The finding here is that the Respondents as a firm of advocates in Aberdeen conducted a substantial general legal business and that they also acted as secretaries and/or registrars to a number of companies. They were primarily law agents and secretaries. They had not set out as registrars. Their registrarships were "incidental" to their business as law agents and secretaries. The two registrarships in question had been the consequence of a friendship between the former senior partner of the Respondents and those who conducted the business which became the business of the two companies. When the registrarships were terminated the Respondents did not consider that they had any entitlement to any payment. Indeed, as is found in the Case Stated, it was only because of the personal friendship between a partner in the Respondent firm and one of the directors that the former had felt it proper to raise with the latter the question whether there might not be an *ex gratia* payment. Though these facts have not been made the basis of a separate contention they are, in my view, of relevance when considering whether the registrarships should be regarded as assets of the Respondents' business. The finding is that the registrarships were "incidental" to their business. It seems clear that the registrarships could neither have been acquired by purchase nor could they have been assigned for a consideration.

The position was that the Respondents' professional qualifications and experience made it appropriate that they should be appointed as registrars even though they had not set out as professional registrars and even though their appointments merely arose out of their professional work. The features connected with the appointments to and the holding of the offices were such as to permit of the conclusion that the offices should not be regarded as assets of the Respondents in their profession. That was the finding of the Special Commissioners:

> "While the offices might loosely be described as assets, in the sense that they were acquired incidentally in the course of the Respondents'

A profession as advocates, they were not in our view trading assets. These offices were not exploited or turned to account; further, they could not be disposed of in the normal way."

I consider that the Special Commissioners were entitled so to hold and consequently to hold that the sum of £2,500 was not assessable under Schedule D.

B I would dismiss the appeal.

Lord Guest—My Lords, the Respondents are a firm of advocates in Aberdeen who carry on an extensive legal business. In addition they act for some 40 companies as secretaries and/or registrars. Those are functions carried on in the firm's office and with the assistance of the firm's staff and for which they receive an annual remuneration. In respect of the termination of C the "post", to use a neutral expression, of registrar for two companies they received a lump sum of £2,500.

The Crown claim that this sum is chargeable under Case II of Schedule D of the Income Tax Act 1952. The reply of the Respondents is that it is exempt from taxation under s. 37 of the Finance Act 1960. The Special Commissioners gave a decision in favour of the Respondents, which was affirmed by D the First Division of the Court of Session.

Sections 37 and 38 of the 1960 Act, so far as relevant, are in the following terms:

"37.—(1) Subject to the provisions of this and the next following section, income tax shall be charged under Schedule E in respect of any payment to which this section applies which is made to the holder or past E holder of any office or employment, or to his executors or administrators, whether made by the person under whom he holds or held the office or employment or by any other person. (2) This section applies to any payment (not otherwise chargeable to income tax) which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the F termination of the holding of the office or employment or any change in its functions or emoluments, including any payment in commutation of annual or periodical payments (whether chargeable to tax or not) which would otherwise have been made as aforesaid."

"38 . . . (3) Tax shall not be charged by virtue of the last foregoing section in respect of a payment of an amount not exceeding five G thousand pounds, and in the case of a payment which exceeds that amount shall be charged only in respect of the excess".

The first question, therefore, which logically arises is whether the "post" of registrar is an "office" within the meaning of s. 156 of the Income Tax Act 1952 and taxable under Schedule E. Lord President Clyde has carefully examined the authorities on this question, and I see no reason to differ from H his conclusion, in which Lord Guthrie and Lord Migdale concurred, that the post of registrar is an "office" within the meaning of Schedule E.

The argument for the Crown was that, whether the appointment of registrar was or was not an "office" under Schedule E, the fees received by the Respondents in respect of the appointment as registrars were nonetheless taxable under Schedule D, and that accordingly the sum of £2,500 received I by them on the termination of that appointment was also chargeable to tax under Schedule D. It appears that during the years 1957–67 the fees received by the Respondents as secretaries and registrars had been assessed along with

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their professional earnings to income tax under Schedule D. This, however, cannot affect the legal position if in fact these fees ought to have been assessed under Schedule E. If the position of registrar was not an office then, of course, the previous assessments were in order and the sum paid on termination of appointment was assessable under Schedule D in accordance with the normal practice. But if, on the other hand, the position of registrar is an office, then the matter is, in my view, concluded by the case of *Mitchell* v. *Ross*(1) [1960] Ch. 145 and 498; [1962] A.C. 813. In the argument before Upjohn J. the taxpayer contended that the fees of a consultant specialist under the National Health Service should be assessed under Schedule D along with his other professional earnings as a private consultant and that, as a logical consequence, the expenses of his profession generally should be deducted from his gross earnings. Upjohn J., in upholding the Crown's contention, decided that the consultant's remuneration from the National Health Service must be assessed under Schedule E as the appointment was an "office" under Schedule E and should not be assessed under Schedule D. I quote from his Lordship's judgment (2), [1960] Ch., at page 167:

> "Mr. Talbot poses the question, is Dr. Ross carrying on one profession or two? The question is a narrow one and without the slightest importance except for the purpose of income tax. In a general sense, of course, Dr. Ross is carrying on the profession of a radiologist whether he is performing his National Health functions or attending to private patients. It is all part of his vocation as a medical adviser. In my judgment, however, the argument ought not to succeed. When carrying out his National Health duties, Dr. Ross is performing the duties of an office and he is taxed under Schedule E. When attending private patients he is exercising his profession and is taxed under Schedule D. Each schedule and the rules thereunder contains, in the words of Lord Atkin in *Fry* v. *Salisbury House Estate Ltd.*(3) 'definite codes applying exclusively to their respective defined subject-matters'."

The case subsequently reached the House of Lords, where Viscount Simonds (4), [1962] A.C. 813, at page 831, said:

> "Dr. Ross, having been assessed to income tax under Schedule E in respect of the profits and gains arising from his part-time appointment, and under Schedule D in respect of the profits and gains arising from his private practice, appealed against the assessments to the special commissioners on two grounds. He claimed, in the first place, that he should be assessed in respect of the whole of his profits and gains under Schedule D, and, in the second place, that if this claim was not upheld, he was entitled in the computation of his liability under Schedule D to deduct the expenses incurred in the exercise of his appointment to the extent that they were not allowed under Schedule E. The first of these two claims was not maintained before this House, learned counsel conceding that an appointment under the National Health Service to such a post as that held by Dr. Ross fell within Schedule E, and that an assessment to tax must, accordingly, be made under that schedule. In my opinion the concession was rightly made and the opposite view was not arguable."

Lord Radcliffe(5), at page 837, agreed with Upjohn J. and stated that in his view the Schedules are mutually exclusive. Lord Cohen expressed the matter

(1) 40 T.C. 11. (2) *Ibid.*, at p. 37. (3) 15 T.C. 266, at p. 320; [1930] A.C. 432.
(4) 40 T.C., at p. 56. (5) *Ibid.*, at p. 60.

succinctly at page 842(1), where he speaks of the excision of the part-time appointment from Schedule D and its inclusion under Schedule E.

This case thus defeats the argument of the Crown that the fees from the appointments as registrar ought to be included in the Schedule D assessments. It is to be remarked that the argument of counsel for the Crown in *Ross's* case when that case was before Upjohn J. was that Schedule D and Schedule E emoluments could not be aggregated, which the Crown now wish to controvert. It is said that if the view expressed above be right the result will be to produce administrative difficulties, as it will be very difficult to apportion the deductible expenses as between the Schedule D and Schedule E assessments. But this did not deter this House in *Ross's* case: see *per* Viscount Simonds(2) [1962] A.C., at page 836.

My view is that, once it is decided that the registrarship is an "office" and the fees assessable under Schedule E, there is no room for any inclusion of those fees under Schedule D. It follows that, in my opinion, the exemption contained in s. 38 of the Finance Act 1960 applies, unless there is some exclusion by reason of the words in s. 37(2) "not otherwise chargeable to income tax". It was argued for the Crown that the holding of the office of a registrar was a "trading asset" of the Respondents and that, on the termination of that office, a sum paid in compensation therefor was a trading receipt of the Respondents' firm. I am not sure that I understand how the holding of an office can be an asset of a firm of lawyers. It cannot, as the Special Commissioners say, be exploited or turned to account and it could not be disposed of. For this reason, I am doubtful whether the decision of Pennycuick J. in *Blackburn* v. *Close Bros. Ltd.* 39 T.C. 164 was sound, where the learned Judge held that the sum received in respect of the termination of a contract of service of a secretarial nature was a trading receipt. However that may be, the principal discussion in that case was whether it was a capital payment or a trading receipt, and the learned Judge decided in favour of the latter view. Moreover, the taxpayers were a firm of merchant bankers assessed under Case I of Schedule D whose trading activities might reasonably be held to include the securing of secretaryships. In the present case the Respondents are lawyers, and there is no finding that it is part of the normal profession of a law agent to act as a registrar or to secure registrarships. It is said to be incidental to the profession but not part of it. The *Close Bros.* case does not, in my view, assist the Crown.

The next case relied upon was *Ellis* v. *Lucas*(3) [1967] Ch. 858, where Ungoed-Thomas J. held that, on the findings of the Special Commissioners, terminal payments were not assets of the taxpayer's business as a chartered accountant. It is true that the learned Judge refers to the auditorships as an asset of the taxpayer's business as accountant. But his decision was on the facts adverse to the Crown's contention. Although it may be said to be a decision on the facts, the present case is *a fortiori* of that decision in respect that the profession of lawyer is further removed from the activities of a registrar than the profession of an accountant. The last case was *Walker* v. *Carnaby Harrower & Co.*(4) [1970] 1 W.L.R. 276, where Pennycuick J. considered his own decision in *Blackburn* v. *Close Bros. Ltd.*, but the case was decided upon an entirely separate ground, that the payment was *ex*

(1) 40 T.C., at p. 64. (2) *Ibid.*, at p. 59. (3) 43 T.C. 276. (4) Page 561 *ante*.

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gratia and therefore not taxable. That question is not raised in the present case.

In my view, those cases do not help the Crown. I cannot visualise the holding of a registrarship as a "trading asset" of the profession of a law agent. In any case, once it is decided that the emoluments of the office of registrar are taxable under Schedule E it is not legitimate to attribute the compensation for the termination of the office to Schedule D. This would be to overturn the principle decided and conceded in the case of *Mitchell* v. *Ross*(1).

I would dismiss the appeal.

Lord Upjohn—My Lords, I have had the opportunity of reading the speech of my noble and learned friend Lord Guest. I agree with it, and for the reasons he gives I would dismiss the appeal.

Lord Donovan—My Lords, I deal first with the question whether these two registrarships were offices within the meaning of Schedule E. The adjective "public" was dropped in the amendment effected by s. 10, Finance Act 1956.

The Companies Act 1948, by s. 110, requires that every limited company shall keep a register of its members. This means that someone in the company must do it. The register is an important record. It evidences the title of the individual shareholder, and it tells the public, who may inspect it, who are the individuals behind the corporate mask. In some small private companies the work of keeping the register could be done by a minor clerk or even a typist. But in the larger companies it is a full-time job taken on by outside concerns, for example banks, who as part of the job deal with new issues, bonus share distributions and the like. In the present case the two companies concerned were sufficiently important to be taken over by Unilever Ltd. I do not think it possible to say that as a matter of law the Special Commissioners were disentitled to take the view that each registrarship was an "office" within the meaning of Schedule E.

Then comes the question how the profits of the office are assessable to income tax in a case like the present. The Respondents are a firm of Scottish advocates in Aberdeen conducting a substantial legal business and also acting as secretaries and/or registrars to some 30 to 40 companies. We do not know in how many companies they were registrars. They themselves seem clearly to have regarded their activities as secretaries and/or registrars as ingredients of one composite vocation. All the profits have gone into one account, and all been assessed to income tax under Case II of Schedule D. This means that in their income tax returns the firm have represented to the Revenue that they are carrying on one vocation of which the secretaryships and the registrarships (which account for nearly one-half of the total income) are a part. And I think that is the true view. One asks, therefore, why there should not be one global assessment under Case II of Schedule D? And the answer is the decision of this House in *Mitchell* v. *Ross* [1962] A.C. 813. I think it is to be clearly gathered from that decision that, even if offices like these registrarships are collected and exercised by a taxpayer as part of his trade or profession, nevertheless, under the rule that each Schedule of the Income Tax Acts is completely self-contained and autonomous, the offices must be separately assessed under Schedule E. In

(1) 40 T.C.11.

(Lord Donovan)

A relation to a case like the present I cannot refrain from saying that I think this rule is quite unreal and serves no useful purpose. Indeed, its application to cases like the present will cause administrative chaos unless the law is changed. There can be no relevant difference between secretaryships and registrarships. Both are offices: and henceforth, if this decision is acted upon, there will have to be 30 to 40 separate Schedule E assessments in the B present case, and the same number of claims for expenses "wholly, exclusively and necessarily" incurred in the performance of the duties of each office. In England the position will be worse. There a partnership is not a separate legal entity, and cannot be separately assessed in one assessment except under Schedule D upon trading or professional profits. Accordingly, a firm of chartered accountants with, say, twenty partners, will have to be C assessed in respect of the profits of each office as auditor by means of separate Schedule E assessments on each individual partner, who likewise will have to prove his deductible expenses.

The rule establishing the paramountcy of each Schedule of the Income Tax Act as regards its own particular subject-matter, first established in *Salisbury House Estate Ltd.* v. *Fry*(1), served a useful purpose in that case. For the D Revenue, having first assessed the company's property under Schedule A, then sought to assess the company under Schedule D so as to tax *inter alia* the excess of the rents over the Schedule A assessment: and not surprisingly received the answer that the Schedule A assessment was exhaustive of liability as regards the property. But where a company sets on foot an organised seeking after offices of profit and conducts them by means of a single organ- E isation, I see no useful purpose whatever in ignoring that situation for income tax purposes, and in treating the edifice which the taxpayer has thus constructed as a collection of individual bricks having no connection with each other. But I think *Mitchell* v. *Ross*(2) compels us for the present to sustain this fiction: and it is not for the Crown to complain, since the result flows from their successful argument in that case.

F We are, of course, here dealing with terminal payments of compensation, and have had to consider the right way of assessing the income while it arose simply as a step towards deciding how the terminal payments should be dealt with. I can see that, as the Crown argue, there could be some cases where, although current income was assessable under Schedule E pursuant to *Mitchell* v. *Ross*, yet the terminal payments might be regarded as income of the G overall trade, profession or vocation: cf. *Blackburn* v. *Close Bros. Ltd.*(3) and *Ellis* v. *Lucas*(4). Not on the ground that the office was a trading asset (which I regard as a completely inappropriate term) or an asset of the profession or vocation, but on the ground that it was a source of profit belonging to the trade, profession or vocation and that the terminal payment might, therefore, be linked to that trade or profession and identified with it as one of its products. H But that would require a clear finding of fact by the Commissioners that the taxpayer had sought the office as part and parcel of his trade or profession: and here such a finding I think, is lacking. The word "incidental" in the Special Commissioners' finding is ambiguous: but they do say that the Respondents did not set out as professional registrars, and by "incidental" I think they must mean something that just happened to come along, and was I acceptable.

(1) 15 T.C. 266. (2) 40 T.C. 11. (3) 39 T.C. 164.
(4) 43 T.C. 276.

(Lord Donovan)

Reluctantly I think that the appeal must be dismissed. I should add (first) that this will, in my opinion, in no way affect the decision in *Davies* v. *Braithwaite*[1], which proceeds upon different considerations: and (second) that no argument has been adduced in the present case that the £2,500 was immune from income tax as being a capital receipt or a gift.

Questions put:

That the Interlocutor appealed from be recalled.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland); Bird & Bird, for Davidson & Syme W.S.]

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(1) 18 T.C. 198; [1931] 2 K.B. 628.