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**Thirty-Third Series**

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**INTOLERABLE INQUISITION?  
REFLECTIONS ON  
THE LAW OF TAX**

***H. H. Monroe***

**STEVENS**

# INTOLERABLE INQUISITION? REFLECTIONS ON THE LAW OF TAX

by

**H. H. MONROE, Q.C.**

**PRESIDING SPECIAL COMMISSIONER**

From its inception the law of tax has had to struggle to make good any claim to respectability and relevance among lawyers. In the 1981 *Hamlyn Lectures* Hubert Monroe Q.C., formerly a leading member of the Tax Bar and now a key figure in the administration of revenue law, considers whether the system, particularly in its legal aspects, contributes to the wariness and hostility with which it is regarded both by the legal profession generally and by the public at large.

The author's theme is that tax law—as a branch of law—has received a raw deal from history, from Parliament and from the judges. His criticisms are reinforced by a searching examination of the reasons, historical and social, why lawyers approach tax law in the way they do.

Chapters include—

- \* The backdrop of history
- \* Parliament's part
- \* The judges' role
- \* The law of tax and the common people

There can be few other branches of the law where the interaction of interests between the community and the individual is regarded by many as little more than a game, and the social and economic consequences of this attitude are becoming increasingly important. *Intolerable Inquisition?* will be of absorbing interest to all those involved in the law of tax, whether as legislators, as lawyers, or simply as taxpayers.

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INTOLERABLE INQUISITION?  
REFLECTIONS ON  
THE LAW OF TAX

BY  
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Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The Thirty-Third Series of Hamlyn Lectures was delivered in London in May 1981 by H. H. Monroe at the Institute of Chartered Accountants in England and Wales.

*May 1981*

AUBREY L. DIAMOND.  
*Chairman of the Trustees.*

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For the rest the shortcomings are homespun, the defects are my own.



These Lectures are respectfully dedicated to those who truly endure the heat and bear the burden, Her Majesty's Inspectors of Taxes.



## CHAPTER ONE

### THE BACKDROP OF HISTORY

Tax is scarcely a favourite topic. If invited to draw up a list of the privileges which in law and custom the common people of the United Kingdom enjoy in comparison with other European peoples—the area designated as germane for the purposes of the Hamlyn Trust—few lawyers would be likely to include in their lists a reference to the Taxes Acts 1970 and the taxation system under which taxes on income are levied. It might not be wholly unfair to suggest that there would be some who would omit the topic from their lists because they know little enough about it and would prefer that matters should remain that way. Objections to the topic, some articulated and some no more than impressions, would range from the complexity and obscurity alleged to surround it to an uneasy feeling that the topic is somehow distasteful and in an indeterminate way alien to those principles of reason and fairness which distinguish the common law. Why does the law of tax have to struggle to make good any claim to respectability or, indeed, relevance among lawyers? Why are its practitioners and exponents set apart? Why are those whose task is to apply and enforce it regarded so frequently with hostility or, at best, wariness? Why when issues of tax law come before the courts do judges so often adopt an approach quite different to that which they normally adopt in relation to other branches of the law? Is the law of tax fairly castigated as unnecessarily complex and obscure? Are there reasons to account for this inherent in the subject matter?

Disagreeable topic though it may be, tax has a widespread relevance. Economists will happily devote time to discussing the form which tax should take since tax and the system adopted for its collection have profound economic effects. Those whose interests lie in the area of public finance and public administration will share with economists their interest in the consequences of this or that form of tax. For accountants tax is of particular relevance since it is pervasive in relation to their clients' affairs: all property and all sources of income have at some stage to come to terms with the demands of tax. Is not the Inland Revenue a partner in every trade, business or enterprise?

I am not concerned with these wider issues. From time to time, some might say too seldom, Parliament takes note of economists'

views and restructures portions of the tax system accordingly. I am not, however, here concerned to examine which features of the tax code reflect what views. For example, between 1850 and 1907 much discussion took place on the distinction between industrious and lazy incomes. The outcome was earned income relief.<sup>1</sup> Much discussion took place before and within the 1955 Royal Commission about the nature of income. The outcome was Capital Gains Tax.<sup>2</sup> Those instances merely illustrate the obvious point that our tax system is sensitive to economists' thinking; thick-skinned, perhaps, but there is continuing consideration of possible change. With that feature of the tax system I am not here concerned. Nor with the day to day application of the tax code to individual cases, the accountant's province.

My purpose is to examine why lawyers approach tax law in the way they do. Parliament, for the most part, makes the law of tax. I will leave it to abler minds than mine to grapple with the question of how far judges make law.<sup>3</sup> As to the law of tax it seems to me that over large areas it owes more to Parliament and less to the judges, but in certain areas—I have in mind the area of anti-avoidance provisions—much to the tensions between Parliament and judges. My examination of tax law and how it is received will start, then, with Parliament, move on to the judges and finish with the common people, those who are at the bitter end of tax, the taxpayers themselves.

It is an accepted and salutary principle when interpreting a written law to start by identifying the mischief which the law was designed to remedy. It seems to me to make sense, therefore, to approach the law of tax by looking first at the circumstances in which income tax entered the law. What were the considerations which governed its shape and its structure? The system introduced at the start of the nineteenth century shows every sign of being with us at the end of the twentieth. What moved the minds of men in 1799? Will the same motivation preponderate in 1999? I do not at this point mean to refer to the circumstance that income tax was a war tax, introduced "for the duration"—relevant though that consideration is to understanding the tax structure then erected. Rather I seek an answer to the question what was the philosophy which

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<sup>1</sup> s. 19 FA 1907 (7 Edw. 7, c. 13).

<sup>2</sup> s. 19 FA 1965 (1965, c. 25).

<sup>3</sup> See, e.g. "The Judge as Lawmaker," the Fourth Chorley Lecture at the London School of Economics delivered on June 25, 1975 and printed in Patrick Devlin, "The Judge" (OUP 1979).

prevailed in Parliament, what would the common people, by their representatives, stand for. The short answer is "anything short of an infringement of property or privacy." And why were these individual rights so highly valued? One explanation is given by R. H. Tawney<sup>4</sup>: "The natural consequence of the abdication of authorities [Church and State] which had stood, however imperfectly for a common purpose in social organisation, was the gradual disappearance from social thought of the idea of purpose itself. Its place in the eighteenth century was taken by the idea of mechanism. The conception of men as united to each other, and of all mankind to God, by mutual obligations arising from their relation to a common end, ceased to be impressed upon men's minds, when Church and State withdrew from the centre of social life to its circumference. Vaguely conceived and imperfectly realised, it had been the keystone holding together the social fabric. What remained when the keystone of the arch was removed was private rights and private interests, the materials of a society rather than a society itself. These rights and interests were the natural order which had been distorted by the ambitions of kings and priests, and which emerged when the artificial superstructure disappeared, because they were the creation, not of men, but of Nature herself. They had been regarded in the past as relative to some public purpose, whether religious or national welfare. Henceforward they were thought to be absolute and indefeasible, and to stand by their own virtue. They were the ultimate political and social reality, they were not subordinate to other aspects of society, but other aspects of society were subordinate to them."

Tawney describes the climate of opinion. Blackstone had delivered the texts<sup>5</sup>: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land . . . So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community."

This then was the way men thought when History broke in.

The year 1798 was a difficult one for William Pitt. It was reliably reported that the French were on the sea. Happily, the wind changed and blew the French out of Bantry Bay but there was no change in

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<sup>4</sup> R. H. Tawney, *Religion and the Rise of Capitalism*.

<sup>5</sup> Blackstone's *Commentaries*, Book 1, Chap. 1.

what the War was costing. All the familiar ingredients of financial crisis were present, mounting expenditure, escalating costs, unprecedented demands on the nation's resources. Increased taxation was inevitable. Pitt's problem? How best to tighten the screw?

Earlier in the century, in his Vinerian lectures at Oxford, Blackstone<sup>6</sup> had identified the principal sources of revenue. They included the duties of customs and excise, the former payable at the ports on merchandise exported and imported, the latter "an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." Blackstone acknowledged that the assessed taxes on such items of expenditure as servants, carriages, horses, dogs, clocks or watches or on a variety of commodities commonly consumed by those with ample resources provided a convenient and economical way of estimating the individual taxpayer's ability to pay and of raising revenue. Like all taxation, however, these imposts involved derogation of common law standards. Blackstone castigated the procedures involved in such taxation, thereby setting a proper pattern for all future generations of lawyers.<sup>7</sup> "The rigour and arbitrary proceedings of excise law seem hardly compatible with the temper of a free nation" he declared. Moreover, the sudden and summary proceedings adopted in case of transgressions operated "to the total exclusion of the trial by jury, and disregard of the common law."

To much the same effect that other great guru of the age, Adam Smith<sup>8</sup>: "Every tax ought to be so contrived, as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the public treasury, in the four following ways." He enumerates the first three: the great number of officers required to levy the tax, the disincentive effect of the tax, and the consequences of the temptation created by the tax to avoid it: "The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it." The fourth way is similar to Blackstone's objection: "Fourthly, by

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<sup>6</sup> Blackstone *loc. cit.* Introduction.

For the continuing influence of Oxford on the development of the Common Law see Louis Blom-Cooper QC and Gavin Drewry *Final Appeal* (Clarendon Press, Oxford, 1972), Chap. VIII.

<sup>7</sup> Blackstone *loc. cit.* Book 1, Chap. 8.

<sup>8</sup> Adam Smith, *The Wealth of Nations*, Book V, Chap. II.

subjecting the people to the frequent visits and the odious examination of the tax-gatherers, it may expose them to much unnecessary trouble, vexation and oppression." On another occasion<sup>9</sup> Adam Smith developed this theme specifically in relation to a general tax on income: "It is easy to lay a tax upon land, because it is evident what quantity every one possesses, but it is very difficult to lay a tax upon stock or money without very arbitrary proceedings. It is a hardship upon a man in trade to oblige him to show his books, which is the only way in which we can know how much he is worth. It is a breach of liberty and may be productive of very bad consequences by ruining his credit; the circumstances of people in trade are at some times far worse than at others."

Pity poor Pitt. The people were unlikely to welcome any further picking of their pockets and when it came to a choice of methods, the pundits were not helpful. Adam Smith had said it again<sup>10</sup>: "The more taxes may have been multiplied, the higher they may have been raised upon every different subject of taxation; the more loudly the people complain of every new tax, the more difficult it becomes, too, either to find out new subjects of taxation, or to raise much higher the taxes already imposed upon the old . . . When a nation is already overburdened with taxes, nothing but the necessities of a new war, nothing but either the animosity of national vengeance, or the anxiety for national security, can induce the people to submit, with tolerable patience, to a new tax." Pitt first adopted the "better the devil we know" expedient: he upped the assessed taxes. In January 1798 Parliament passed "An Act for granting to His Majesty an aid and contribution for the prosecution of the War."<sup>11</sup> Those who had paid tax on their male servants, carriages or pleasure horses, on their houses, windows, dogs, clocks or watches, were to pay again, three times over.

Some taxpayers paid up. For example, the printed records of the Middle Temple<sup>12</sup> disclose that during the Treasurership of Sir John Scott, later Lord Eldon, there was paid on December 13, 1797 £25 described as "Servants, tax on ten men, and twenty per cent. thereon." The accounts for the following year, 1798-1799, include the entries "18 Dec. Servants' tax, and twenty per cent. additional,

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<sup>9</sup> Adam Smith quoted by William Phillips, "The Real Objection to the Income Tax of 1799," [1967] B.T.R. 177.

<sup>10</sup> Adam Smith *loc. cit.* Book V, Chap. II.

<sup>11</sup> 38 Geo. III., c. 16.

<sup>12</sup> A Calendar of the Middle Temple Records. Edited by Charles Henry Hopwood K.C. 1903.

£24, and £4 additional and Clock Duty £33.7.6. . . . 4 April. Three instalment of increased assessed taxes for prosecuting the War £72. 0. 0."<sup>13</sup> It seems possible that other taxpayers were less scrupulous or less prompt. The measure which Pitt introduced to Parliament in December 1798 and which became law on January 9, 1799 as the first ever Income Tax Act,<sup>14</sup> being substituted for the 1798 Act, included these opening words: "We your Majesty's most dutiful and loyal subjects . . . taking Notice that the Provisions made for that purpose . . . have in sundry Instances been greatly evaded, and that many Persons are not assessed under the said Act in a just Proportion to their Means of contributing to the Public Service. . . ."

Adam Smith notwithstanding Pitt had decided—under the stress of war—to take the ultimate step, to introduce a new tax which would take a man's income rather than his expenditure as its scale. So, as a temporary wartime measure, the income tax was born and its form for the next century and a half at least determined. That Pitt had the points taken by Adam Smith well in mind is apparent from the terms in which he introduced his measure<sup>15</sup>: "Impressed, then, with the importance of the subject, convinced that we ought, as far as possible, to prevent all evasion and fraud, it remains for us to consider, by what means these defects may be redressed, by what means a more equal scale of contribution can be applied, and a more extensive effect obtained. For this purpose it is my intention to propose that the presumption founded upon the assessed taxes shall be laid aside, and that a general tax shall be imposed upon all the leading branches of income. No scale of income indeed which can be devised will be perfectly free from objection of inequality, or entirely cut off the possibility of evasion. All that can be attempted is, to approach as near as circumstances will permit to a fair and equal contribution. I trust that the opinion of the country will concur with the disposition of Parliament to give that energy to our exertions, to give that stability to our resources, which our present situation and our future prosperity demand."

Pitt, then, was well aware of the hazards involved in introducing a new tax. He trusted to the exigencies of the current situation to reconcile the taxpayer to the tax. He would reject expenditure as a base and risk "the inquisition more intolerable than any tax,"<sup>16</sup> to which Adam Smith had referred. However, the pill must be sugared.

<sup>13</sup> Middle Temple Records *loc. cit.* p. 230.

<sup>14</sup> 39 Geo. III., c. 13.

<sup>15</sup> *Parliamentary History* Vol. 34 1798-1800 December 3, 1798.

<sup>16</sup> See [1967] B.T.R. 177.

No one was to be bound to disclose the details of his income. He could accept the liability assessed. If unacceptable, disclosure was the price of escape. Such information as was disclosed would be used for no purpose other than quantifying liability for tax: all concerned would be sworn to secrecy. No awkward question need be answered, no confidential clerk called on to testify. So Pitt sought to meet the objections inevitably entertained by any true-born Englishman to any intrusion which might threaten his liberty and his right to conduct his personal affairs privately. The cloak of secrecy was wrapped around the administration of income tax; dislike of, distrust for and discourtesy towards tax officials were institutionalised; the suspicions (dare one say the prejudices?) of all who cherished the common law were confirmed. Pitt's explanation of his proposed tax, how it would effectively be based on self-assessment and non-disclosure, is a masterpiece. First he explained that incomes under £60 would be exempt and that abatements would apply to income between £60 and £200. Over that figure, he explained, "The quota which will then be called for ought to amount to a full tenth of the contributor's income. The mode proposed of obtaining this contribution differs from that pursued in the assessed taxes, as instead of trebling their amount, the statement of income is to proceed from the party himself. In doing this it is not proposed that income shall be distinctly laid open, but it shall only be declared that the assessment is beyond the proportion of a tenth of the income of the person on whom it is imposed. In this way, the disclosure at which many may revolt will be avoided, and at the same time every man will be under the necessity of contributing his fair and equal proportion. How then it will be asked, is evasion and fraud to be checked? Knowing the difficulty of guessing what a man's real ability is, I do not think that the charge of fixing what is to be the rate ought to be left to the commissioners. It would, I am persuaded, be most acceptable to the general feeling, to make it the duty of a particular officer, as surveyor, to lay before the commissioners such grounds of doubt, as may occur to him, on the fairness of the rate at which a party may have assessed himself. These doubts and the reasons on which they are founded, are to be transmitted by the surveyor to the commissioners, in order that they may call for further explanation from the person concerned..."

The commissioners referred to are the local commissioners to whom the administration and execution of the tax would be entrusted. To qualify they would have a certain minimum property qualification. As Pitt explained, they were to be "persons as

respectable in their situation and rank in life, as independent of all real or imputed influence and as likely to discharge the duties of their station with attention and ability, as possible."<sup>17</sup> The surveyor, in due course to become the government inspector, was the person to whom odium might attach. His task was to entertain suspicions and to voice them. Only if he entertained doubts should the taxpayer be called on to prove or justify. When finally the commissioners had fixed the rate of the taxpayer's contribution it was contemplated that a further appeal would lie to appeal commissioners, similar public-spirited individuals, but with an even higher property qualification. Seemingly they had little to do. They disappeared when the structure of the tax was revised: the decision of the commissioners, the General Commissioners as they became, was to be final and remained final for many years.

Pitt explained the circumstances in which a taxpayer might be required to condescend to particulars: "When doubts are entertained that a false statement has been given, it shall be competent for the commissioners to call for a specification of income. It will be necessary to simplify and to state with precision the different proportions of income arising from land, from trade, annuity or profession, which shall entitle to deduction. [It was contemplated that there would be abatements applicable to income from certain sources only.] The commissioners are then to say whether they are satisfied with the statement which has been given. The officer or surveyor is to be allowed to examine and to report whether there appears reason to believe that the assessment is adequate. When the day of examination arrives, the commissioners shall hear what the surveyor and the party have to allege in support of the objection and the assessment, and examine other individuals. The schedule, which shall be drawn up in such a manner as accurately to define every case of exemption or deduction, shall be presented by the party, with his claim clearly specified. [The schedule, as it eventually emerged, effectively provided for a return of total income under four heads subdivided into 19 cases with general and particular rules relating to deductions.]<sup>18</sup> To the truth of the schedule he shall make oath. The party, however, shall not be called for, nor his confidential clerks or agents examined. If, however, he declines to submit to the investigation of his books, and the examination of his clerks, and other means of ascertaining the truth, it shall be competent for the

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<sup>17</sup> See "The General Commissioners," B.E.V. Sabine [1968] B.T.R. 18.

<sup>18</sup> See, for the Sched., 39 Geo. III. c. 22.

commissioners to fix his assessment, and their decision shall be final, unless he appeals to the higher commissioner. No disclosure is compulsory; but if the party is unwilling to disclose, he must acquiesce in the decision of the commissioners, who shall not be authorised to relieve without a full disclosure. With respect to the information which may be communicated to the commissioners, I should propose that they shall be strictly sworn not to disclose such information, nor to avail themselves of it for any other purpose separate from the execution of the act."

Here may I quote what Professor Street said in his 1968 Hamlyn Lectures, *Justice in the Welfare State*<sup>19</sup>? Dealing with the reasons for the rise of Administrative Tribunals, for practical purposes he dated their rise from the introduction of unemployment tribunals under Lloyd George's National Health Insurance Act 1911. "We usually call these bodies administrative tribunals. The name is a good one. It distinguishes them from the ordinary courts. It also reminds us that it is a question of policy to be resolved by the Administration what arrangements are appropriate for deciding a particular set of claims. For instance, the Government decides to introduce a State scheme of unemployment benefits. It works out how the money is to be raised and prescribes the qualification for benefit, and the manner of making payments. It has to meet the situation where a citizen claims benefit and a government official does not accept his claim. It is purely an administrative matter how the Act is going to handle those contested issues. That matter will be resolved, not by laying it down that because there is a dispute it is a judicial question for a judge, but by asking what in the circumstances is the most efficient manner of performing this administrative task." Pitt effectively anticipated Lloyd George by over a century: he instituted a system of tribunals manned by unpaid citizens whose tasks were to fix the quotas of the contributions to be made by their fellow citizens for public purposes and, in the event of any dispute between government official and individual taxpayer, to resolve the contested issues. These tribunals were to be distinct from the ordinary courts; no provision was made for their determinations to be referred to the courts. It would be 75 years before the code included a right of appeal to the courts from a determination of the commissioners. This appears to have been quite deliberate. There was such a right in relation to the assessed taxes. For example, a Consolidating Act of 1803<sup>20</sup> relating to the taxes on windows,

<sup>19</sup> Harry Street *Justice in the Welfare State* (Stevens & Sons, 1968).

<sup>20</sup> 43 Geo. III, c. 99.

inhabited houses, servants, carriages, horses, mules and dogs provided by section XXIX in relation to appeals heard by the commissioners responsible for those taxes: "Appeals once heard and determined shall be final. No alteration [was to be admitted] except in such Cases where the Opinion of the Judges shall be required according to the Provisions of any Act or Acts concerning the same." Doubtless, if he even gave the matter a moment's thought, Pitt regarded the income tax as a temporary expedient and privacy as more important than points of law.

Not only were the tribunals so established distinct from the ordinary courts but, as a matter of policy, the manner in which claims were to be decided bore little resemblance to common law procedure. First, it was for the taxpayer to declare his income. Pitt contemplated that he would merely declare that the proposed figure was adequate, a proper discharge of his quota, but in course of time this was modified: the making of a return of income by the taxpayer was from the outset and is today the first step in the process of fixing his liability. If there were doubts, the surveyor was to raise them. Then the commissioners would decide. Today surveyor has merged with inspector (originally, as the name suggests, a senior officer who oversaw the work of surveyors, a part of the internal processes of the Revenue which still exists today), and the inspector has taken over the task of making assessments from the commissioners. But if the citizen claims benefit of exemption or abatement or challenges the inspector's assessment, he must still, as under Pitt's arrangements, disclose the details of his affairs. The onus is on him, not on the inspector to prove what tax is due. The underlying assumptions as to how tax will be imposed and how disputes will be resolved are as they were in 1799 and they have little to do with the common law.

Pitt's Income Tax Act lived up to the prospectus. Section II provided that ". . . there shall be raised, levied, collected and paid annually . . . upon all Income arising from Property in Great Britain belonging to any of His Majesty's Subjects, although not resident in Great Britain, and upon all Income of every Person residing in Great Britain . . . the several Rates and Duties following." What followed provided for tax at 2/- in the £ on any income over £200 with such familiar features as abatements for children and exemption for charities. Guidance was given on who was to be regarded as resident and who as not resident in Great Britain. That guidance is still

offered in today's code.<sup>21</sup> Conceivably age has dimmed its clarity; the words used have not been altered.

The oath to be taken by Commissioners, in the form promised, was contained in section XXII: "that I will judge and determine upon all Matters and Things which shall be brought before me under the said Act without Favour, Affection or Malice and that I will not disclose any Particular contained in any Schedule of Income or any Evidence or Answer given by any Person who shall be examined or make Affidavit respecting the same, except in such Cases and to such Persons only when it shall be necessary to disclose the same for the purposes of this Act or in order to, or in the Course of, a Prosecution for Perjury committed in such Examination or Affidavit." The oath is still in the code today,<sup>22</sup> its language altered to a more insipid and less robust formula but its sense unchanged. Commissioners who undertook to execute the Acts dealing with the assessed taxes swore to do so without Favour or Affection but the requirements of secrecy were absent. Theoretical justification for extreme secrecy can, of course, be provided. But, as R. H. Tawney once commented<sup>23</sup>: "Englishmen are incurious as to theory, take fundamentals for granted, and are more interested in the state of the roads than in their place on the map." Pitt was interested in getting his tax accepted; it would not be unless the bugbear of disclosure was outfaced. So, secrecy became part of the income tax code.

Section LXV of Pitt's Act gave a right to appeal to the "higher" commissioners. The substance of it is unimportant for, as has been mentioned, it seems that the right was seldom, if ever, invoked. But the form of the section is significant since it contains words and expressions still found in the code and lays down a procedure for pursuing appeals in cases of dispute which still governs the prosecution of appeals today. The section provides that ". . . in any case where the party assessed shall have verified the Particulars contained in his or her Schedule of Income upon Oath, and when the Surveyor or Inspector shall nevertheless apprehend the Determination made by the said Commissioners to be contrary to the true Intent and Meaning of this Act, or that they have disallowed any Surcharge, or allowed any Deduction contrary to the same, and shall then declare himself dissatisfied with such Determination, it shall and may be lawful for such Surveyor or Inspector to require

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<sup>21</sup> ss. 49 and 51 ICTA 1970 (1970, c. 10).

<sup>22</sup> See Sched. 1, TMA 1970 (1970, c. 9).

<sup>23</sup> R. H. Tawney *loc. cit.*

the said Commissioners to state specially and sign the Case upon which the Question arose together with their Determination thereupon; which case the said Commissioners, or the major part of them then present, are hereby required to state and sign accordingly, and to cause the same to be by him transmitted to the Commissioners of Appeal, who are hereby required, with all convenient speed, to return an Answer to the Case so transmitted, with their Opinion thereupon subscribed thereto, according to which Opinion so certified, the Assessment which shall have been the Cause of such Appeal, shall be altered or confirmed." No doubt the procedure for taking a disputed question up upon appeal by way of case stated was based on precedents applicable to other taxes. The example has been mentioned of taking the judges' opinion on disputed questions relating to the application of the Acts imposing the assessed taxes. There is no reason to suppose that the procedure was not well understood and common enough in 1799. There is a passage in Blackstone's *Commentaries* which suggests that a system of referring difficult questions of law to a higher authority had respectable antiquity<sup>24</sup>: "When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing and take his opinion upon it." Blackstone comments, and the principle is well established, that this was a bad method of interpretation since "to interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression."

Pitt's income tax was not a great practical success. A temporary lull in the War provided occasion for its repeal. By the time the War started up again Pitt was at odds with the King and Addington in the saddle. Back came the income tax, this time with Addington's name attached and certain changes. To spend time on determining who was the father of the infant income tax may appear unprofitable. The popular voice would deny it lawful paternity. For my part I prefer Pitt's claim to be the true begetter since, as it seems to me, it was he who went against the trend and, for all that he wrapped his proposal up, required the citizen to disclose his resources so that government might take its tithe. Those who might wish to pursue the historical details will find them assembled in two erudite and entertaining articles by the late William Phillips in the 1967 *British Tax Review*.<sup>25</sup> He shows that Pitt's embrace of a

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<sup>24</sup> Blackstone *loc. cit.* Introduction, Section the Second.

<sup>25</sup> [1967] B.T.R. 177 and 271.

general tax on income was all the more remarkable in that it involved what would today be called a U-turn; as recently as 1797 Pitt had advanced, to great effect, the argument that such a tax as he now proposed would involve a scrutiny of property such as was not to be tolerated. Indeed, it was precisely his scruples about this scrutiny which would seem to have led Pitt to hold his hand in requiring information from the taxpayer. William Phillips comments: "In 1800, when the extent to which the tax of 1799 had failed, because of the vague form of the general return of income, became known, and the extent to which the secrecy in which Pitt had enshrouded everyone's income had led to wholesale evasion, Rickman wrote: 'I do not see why the exact state of a man's pecuniary affairs should not be known, as well as the colour of his coat, or the complexion of his countenance.' A year later Newberry asked whether secrecy was not 'a prudish delicacy, a solecism in finance,'<sup>26</sup> adding 'Notoriety is the antidote to subterfuge and evasion.' "

Be that as it may, it is not the case that Addington's solution was to whip off the veils of secrecy: he sought to meet the objections to a return of "total" income certainly, and he introduced, (or resuscitated, depending on where you stand in the historical disputations), deduction at source, perhaps the only really effective method of collecting tax. Let the Commissioners of the Inland Revenue take up the tale. Their Report for the years 1856 to 1869 presented to Parliament in 1870<sup>27</sup> contains a succinct summary of the relevant history. In passing, it may be worth emphasising that my concern is not with historical accuracy. For me, the myth is important for it contains the message: what was the received view, what the authorised version of events which subsequently shaped men's minds and governed their attitudes? After mentioning the triple assessment Act of 1798 "introduced at the instance of Mr. Pitt" the Report continues: "In the year 1799 by the Act of 39 Geo. III, c. 13 the duties granted by the above-mentioned Act of 1798 were repealed and in lieu thereof a duty was imposed upon income at the rate of 10 per cent. By this Act all persons were required to make returns of the whole of their income from whatsoever source the same was derived. [This, of course, was

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<sup>26</sup> Cited [1967] B.T.R. at p. 186.

<sup>27</sup> Report of the Commissioners of Inland Revenue on the Duties under their Management, for the years 1856 to 1869 inclusive, with Some Retrospective History. Presented to both Houses of Parliament by Command of Her Majesty, 1870. c. 82.

the very impression which Pitt had struggled to avoid.] The produce of the tax in the first year after this alteration was £6,046,624, or about a quarter of a million for every penny of the tax."

"In 1803 the present system of charging incomes upon all property and profit at their first source was introduced, and the return of the whole income, previously required, was abandoned . . . This principle [taxing income at its source] is thus explained in some observations on the tax, published at the time under the authority of Government. 'As the former duty was imposed on a general account of income from all sources, the present duty is imposed on each source, by itself, [the 1803 Act introduced the familiar Schedules A to E] in the hands of the first possessor, at the same time permitting its diffusion through every natural channel in its course to the hands of the ultimate proprietor. Instead of the landlord and the various claimants upon him in succession, it looks to the occupier only. Instead of the creditor, it looks to the fund from which the debt is answered. In the place of a complicated account, collected from the various sources from which the income of an individual is derived, it applies to the source itself to answer for its increase. By these means its object is attained with more facility and certainty, and with less intricacy and disclosure, diminishing the occasions of evasion by the means of exaction: thus the charge is gradually diffused from the first possessor to the ultimate proprietor, the private transactions of life are protected from the public eye and the revenue is more effectually guarded."

"To the foregoing remarks," the Report continues, "it might have been added, that the system leaves unrevealed to all those connected with the assessment to the tax the total income of any person except those who claim entire exemption from it, or those who seek to obtain an abatement of duty. The produce of the tax under this system at the reduced rate of 5 per cent. was almost equal to that of 1799, when the rate was 10 per cent."

So the proof of the pudding was in the eating. Addington had attained a more extensive effect than had Pitt. He had done so, in effect, by treating sources of income rather than receivers of income as the subjects of charge and by throwing on to the distributors of income the obligation to collect and account for the tax attributable to those to whom the income was distributed. This technique for diminishing the occasions of evasion by the means of exaction was admirably suited to the shape which the income tax then had and to the majority of the forms of income to which the tax then applied. It was to work well for three-quarters of a century. It was, of

course, the wicked Liberals with Lloyd George's 1909 Budget and the introduction of super-tax who would upset the well-balanced apple cart—but that is to anticipate.

Meanwhile the income tax settled down. There were, of course, amendments. But in 1806 the Income Tax Act<sup>28</sup> brought together the various strands, made a few amendments and set a pattern which would serve as the basis of income tax from then until now. The tax was not of course popular but, while the War lasted, tolerable. Came Waterloo and the end of the War and the Government of the day was soon reminded that Mr. Pitt's tax had been a wartime measure and Mr. Addington's was, in terms, to end when peace returned.

Debate took place in Parliament regarding the possibility of retaining the income tax. The discussion reveals the extent to which the notion had flourished that there was something off-side and un-British about income tax. The whole thing smacked of inquisitorial oppression. That these notions should flourish is not surprising. The propaganda was powerful, the myths strong. We read that when Pitt's income tax was repealed, Parliament ordered all documents and records relating to the tax to be destroyed on the basis that too much information had been given to the representatives of Government by the private citizens of the country, particularly as the total income of each contributor had been revealed. The records were to be cut into small pieces, taken to a paper manufactory and there committed to the mash tub. One of the Commissioners for the Affairs of the Taxes (later the Commissioners of Inland Revenue) was to stay and see the job done properly. The laudable and energetic researches of the late William Phillips have disclosed that the Commissioner may have failed in his allotted task since it appears that a set of records were retained.<sup>29</sup> But the accuracy of the story is of no significance: the strength of the myth is what counts.

As has appeared from section LXV of the 1799 Act already quoted, part of the system, retained after 1803, involved the Surveyor, a government official, proposing a surcharge if he considered the taxpayer's figures inadequate. This struck fire from William Cobbett, robust purveyor of British sentiments.<sup>30</sup> "Hired informers of the government, whether surveyors, inspectors, or by whatever fashionable appellation they may be called, surcharge

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<sup>29</sup> "A New Light on Addington's Income Tax," William Phillips, [1967] B.T.R. 271.

<sup>30</sup> Cobbett *Political Register*, January 10, 1807.

without mercy. Surcharges made upon mere speculation! What degradation must an innocent man suffer even should he succeed in satisfying these gentlemen that he has made an honest return." We have journalists, authors and publicists today who write on the same items with as much fury but, perhaps, with less felicity.

Small wonder, then, that the Chancellor of the Exchequer of the day, Nicholas Vansittart, later Lord Bexley, should have adopted a defensive posture in February 1815<sup>31</sup> when seeking to persuade the Committee of Ways and Means that the income tax should be retained. "A right honourable gentleman [It was in fact Mr. Tierney] not long since, had begged pardon of God, and of the public, for the part he had taken in imposing this tax in 1806.

They had been told of the inquisitorial nature of this tax, and of the tyrannical manner in which the powers derived under it were exercised. He, however, believed that the commissioners (and here he spoke of men subject to human infirmity) had always acted according to the fair dictates of their judgement. He was convinced that their motives were most pure, patriotic and laudable. It should be recollected that the duties created by the Act, were not performed by men appointed or paid by the Crown, or having any interest divided from the mass of their fellow subjects. They were performed by the same sort of gentlemen to whom the country was indebted for the preservation of tranquillity; by that set of gentlemen who were in the commission of the peace, and who administered the internal affairs of the Kingdom in a way highly honourable to them, and no less beneficial to the nation in general. . . ."

The Chancellor then went on to discuss inquisitorial powers given to Commissioners to support the collection of taxes in the time of Queen Anne. No doubt these were those powers of which Blackstone was so critical.<sup>32</sup> As has been known to happen in our own day, the Chancellor defended his position by pointing out how bad the situation was in the time of Queen Anne. He then went on to deliver a reasoned defence of the structure of income tax as it stood in 1815—and, incidentally, was to be restored in 1842—"Now with respect to the property tax [the name commonly given to the income tax] it would be found that wherever it was possible to make an estimate by reference to the property to be charged, and without ulterior enquiry, it was always preferred. Like all other

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<sup>31</sup> *Hansard* February 20, 1815.

<sup>32</sup> See above n. 7.

efforts of legislative wisdom, the Act undoubtedly had its imperfections. With regard to funded and landed property, the mode of charge was clear and plain. With respect to funded property, it might be considered as absolutely perfect, as it admitted no possibility either of evasion or overcharge: and with respect to landed property, it approached very nearly to perfection. But, with reference to trade, it was obviously imperfect. An extensive power was inevitably and necessarily obliged to be given to the commissioners for the purpose of procuring regular returns. If, at any future time, the tax should be renewed, with such an amendment as would ensure true returns without having recourse to the power he had just noticed, he thought that was all the improvement that could be looked for."

The rival merits of a standard rate and graduated rates were also noticed. This part of the defence of the system is material in that there is a case to be made for the claim that it was super-tax and the graduated rates which led to evasion, complication and the multiplication of the ills to which we are heirs today. Perhaps, the situation was simpler in 1815 but, in principle, the essentials were the same. The *Hansard* report continues: "The second modification suggested to him was, to charge persons possessing very high incomes, at an increased rate, and either greatly to reduce the charge, or to exempt altogether from the operation of the Act, individuals of more confined circumstances. This, however, he considered to be totally impracticable; because the Act gave them no insight into the total income of any person. The principle of the Act was, to charge every species of income, from whatsoever source it might be derived, as a distinct property, without examining the general situation of the proprietor. A person, for instance, might be employed in trade, at a variety of places. He might have a banking house in London, a mercantile establishment at Bristol, a large manufactory at Manchester, £100,000 in the funds, and £5,000 a year in land, (a laugh); and, as the Act was at present constituted, he would be separately and distinctly assessed for every one of these sources of property, without any one assessor being able to say what the aggregate amount of his income was."

But for all Vansittart's persuasiveness the House would have none of it. Dowell attributes the final rejection to a chance comment of Castlereagh<sup>33</sup>—"An ill-timed observation of Castlereagh regarding 'ignorant impatience of taxation' had the same effect in irritating

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<sup>33</sup> Dowell, *History of Taxation*, Vol. II, p. 263.

the minds of the people, as Walpole's observation about 'sturdy beggars' at the time of his Excise Bill, and increased the opposition to the proposal to retain the tax at half rates. The total repeal of the tax formed the subject of innumerable petitions to the House of Commons, a course in which Brougham, as an agitator, and the citizens of London as petitioners, took the lead. And, after prolonged debates in the House, the government reluctantly abandoned their original proposal, and instead of retaining the income tax at half rates, gave it up in toto."

At this point I am aware that by all the canons of relevance I should pass at once to Peel's reintroduction of the income tax in 1842. But why did Peel return to income tax? It obviously was not a popular tax. But consider the alternatives. A mass of customs and excise duties on every conceivable item of consumption. In our own times Purchase Tax softened us up; when Value Added Tax arrived we had little spirit left. But consider how the matter stood 160 years ago. I include the following quotation for three reasons: first there may be those who have not heard or read it before; as a piece of satiric prose it simply is unsurpassed—the name today is fearless investigative journalism; secondly, it illustrates much more effectively than anything I can say the point which I seek to make, that a tax in whatever form it is introduced, to a pronounced degree has to withstand a barrage of brickbats, catcalls and downright opposition, so much is inevitable; and thirdly, it emphasises the difficulty which must always confront the legislator who seeks to impose a tax, that tax is much more easily opposed, ridiculed and gayed than it is proposed, imposed or justified. Sydney Smith, writing in the *Edinburgh Review* in 1820 had this to say of the formidable list of taxes then in force: "We can inform Brother Jonathan what are the inevitable consequences of being too fond of glory. Taxes upon every article which enters into the mouth or covers the back or is placed under the foot. Taxes upon everything which it is pleasant to see, hear, feel, smell or taste. Taxes upon warmth, light and locomotion. Taxes on everything on earth or under the earth, on everything that comes from abroad or is grown at home. Taxes on the raw material, taxes on every fresh value that is added to it by the industry of man. Taxes on the sauce which pampers man's appetite, and the drug which restores him to health; on the ermine which decorates the judge, and the rope which hangs the criminal; on the poor man's salt and the rich man's spice; on the brass nails of the coffin, and the ribbons of the bride; at bed or board, couchant or levant, we must pay. The schoolboy whips his taxed top; the

beardless youth manages his taxed horse, with a taxed bridle, on a taxed road; and the dying Englishman, pouring his medicine, which has paid 7 per cent., into a spoon that has paid 15 per cent., flings himself back upon his chintz bed, which has paid 22 per cent., and expires in the arms of an apothecary who has paid a licence of a hundred pounds for the privilege of putting him to death. His whole prosperity is then immediately taxed from 2 to 10 per cent. Besides the probate, large fees are demanded for burying him in the chancel. His virtues are handed down to posterity on taxed marble, and he will then be gathered to his fathers to be taxed no more."

In passing three questions occur to the mind: (1) Did we suppose that in our contemporary world there were new ideas or new taxes? (2) Is there any branch, for example, of the criminal law which must contend with a bombardment of propaganda indicating that there is every justification for its breach? And (3) When so much eloquence is deployed against tax, who will speak for it?

With commendable brevity the Commissioners of the Inland Revenue in the Report already cited<sup>34</sup> record the reintroduction of the income tax by Sir Robert Peel in 1842: "In the year 1816 the income tax ceased. It was not revived until the year 1842, when it was reimposed by Sir Robert Peel's government, not as a war tax, but for the purposes of repairing the deficiency which then occurred in the revenue to meet the expenditure of the country, and to enable the Government to make some reforms, with the view of improving the commerce and manufactures of the Kingdom." One has the impression that Peel was a practical realist. A number of the assessed taxes had been dropped. Need one ask why after reading the *Edinburgh Review*? Income tax had all the symptoms of inevitability. Peel introduced it for four years and subsequently sought to extend it for a further three years on the basis rather agreeably put as recorded by Dowell<sup>35</sup> that it would be justified by prosperity. "He now advanced a step in his plans for fiscal reform, and asked the House to reimpose the income tax for three years after its expiration in 1847 'in order to enable me,' he said, 'to make arrangements with regard to the general taxation of the country which will lay the foundation of great commercial prosperity, and materially add to the comforts even of those called on to contribute.'"

This last comment was modest enough coming from one who left

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<sup>34</sup> See above n. 27.

<sup>35</sup> Dowell *loc. cit.* p. 327.

his name to the police force which would protect, or at least do its best to protect, the prosperity of those who would be paying Peel's income tax. But why, one is disposed to ask, did not Peel propound more fully the positive reasons why tax—and indeed income tax in some form—is an inevitable price for membership of a civilised community?

Income tax had gone out in 1816 with such comments as those attributed to one Mr. William Smith<sup>36</sup>: "As far as the commercial world was concerned, the great evil of the tax consisted in that inquisitorial visiting which laid open to the world, with the most ruinous effect, the exact situation of every man's affairs, however he might wish for concealment." Mr. Smith appears to have been among the first of a long line of Members of Parliament who are prone to comment on tax matters without first checking how the system actually works in law or in practice.

Income tax returned in 1842 to no warm welcome. Indeed, the Iron Duke himself, the Duke of Wellington, was moved to utter from his exalted situation in the House of Lords<sup>37</sup>: "We are aware of the odious nature of the powers given to the Commissioners and others appointed to carry out its provisions, and to whom it must be entrusted, and we reconcile it only to ourselves by the strong necessity of the case—nothing but the certainty that no other course could be taken which would produce a revenue to enable us to meet the difficulties of the country, or to take those measures which may be necessary for its prosperity, could have induced us to propose such a measure to Parliament; and, as I have said before, it will not be continued one moment longer than is absolutely necessary."

This was the Duke himself proposing the reintroduction of income tax to the House of Lords. If income tax had such friends as

<sup>36</sup> *Hansard* March 18, 1816 Col. 435.

<sup>37</sup> Cited in the Introduction to "The Act for Levying a Tax on Property and Income [5 & 6 Vict. c. 35] with an Explanatory Introduction, Notes, A Copious Analytical Index and Tables for Computing the Tax" by Mordant L. Wells, of the Middle Temple, Barrister-at-Law.

Sir Mordant Wells, who later was Chief Justice in Calcutta, in 1842 had just been called to the Bar. It seems that then, as now, briefless barristers were in the habit of producing instant text-books on new legislation. This particular text-book, the earliest legal text-book on tax which I have been able to locate, would scarcely have increased its reader's knowledge of the tax. Apart from the copious index, the book added little or nothing to the text of the statute. Apparently over the years the genre has not changed.

For assistance in locating this surprising book, as for other help and kindnesses, I am most grateful to the Librarian of the Middle Temple and to the members of her staff.

this, it scarcely needed enemies. Consider also the Duke's claim to familiarity with the odious powers possessed by the Commissioners. Pitt, to put the matter crudely, had hamstrung the system to avoid odious powers. The system is hamstrung today. Times change but attitudes move slowly. And so, with the Duke of Wellington's qualified acceptance income tax came back for a third time; to stay for ever? Certainly it has the look of a permanency.

What conclusions are to be drawn from the history of how income tax came into the code? From the start it had a bad name. Tolerable as an emergency measure imposed for a temporary period only, it none the less violated fundamental liberties. Local administration by worthy and reliable citizens was to reconcile the taxpayer to its imposition. The representative of Government was to have no more than an interventionist role. Separately identified, the surveyor was subject to the rulings of the local commissioners. What his fellow citizens determined was to be final for the taxpayer. It was not open to the surveyor to take matters further. All would be conducted behind closed doors. No one would know the taxpayer's means. The rich miser would remain concealed, the poor tradesman's credit unblemished. From the technical point of view, most of the tax would be deducted at source in any event; tenants could raise no objections when they could deduct tax from the rent ("Landlord's Property Tax excepted" was the well worn phrase) or mortgagors when they could deduct tax from interest. Paymasters and agents would attend to the deductions of tax from emoluments and stipends; the bank would look after any tax in relation to the funds. Only the tradesman or the professional man would be called on to declare the profits of his trade or profession. His oath that his figures were accurate would normally suffice. Nothing so troublesome as an account would be called for, and his books would remain unexamined.

Income tax, to become one day the most formidable fiscal device, the most pervasive impost, was thus persuasively and discreetly launched. Few enough of the common people would be concerned. Those in higher stations doubtless accepted what was trifling and temporary as tolerable. Lawyers could forget income tax and concentrate on the charms of the common law.

## CHAPTER TWO

### PARLIAMENT'S PART

Parliament's particular part in the taxing process is to pass the statutes. It would be putting it high to say that the task is discharged to the satisfaction of all concerned. Criticism, more particularly criticism concerned with the legal aspects of tax, tends to concentrate on obscurity and complexity: why cannot they say what they mean—clearly? Criticism of the manner in which taxing statutes and even explanations of taxing statutes, are set out and expressed is not new. Sir Alexander Johnston<sup>1</sup> tells us that on the introduction of the income tax in 1799 a pamphlet was produced entitled "A Plain, Short and Easy Description of the Different Clauses in the Income Tax, so as to Render it familiar to the Meanest Capacity" and that a contemporary caricature shows "John Bull at his studies" scratching his head over the pamphlet and expostulating that "I have read many crabbed things in the course of my time but this for an easy piece of business is the toughest to understand I ever met with." In May 1853 when the Finance Bill was under discussion in the House of Commons, an Honourable Member, Mr. J. Phillimore, commented<sup>2</sup>: "If this Act had been prepared by a Hindoo, he believed it would have been urged as a proof of the incapacity of the Hindoo mind." Jocular criticisms in the same vein were much in vogue when the 1965 Finance Act introduced the Corporation Tax.

Criticism is easy: the more difficult questions are whether the particular criticism is justified in relation to the statutory provisions criticised and, if so, what if anything can be done to ameliorate the defects of the legislation. When, in the same debate in 1853, Mr. Gladstone was urged to try consolidation as a remedy, his reply was the familiar one that there would not have been time to produce a consolidating Bill. What he went on to say is as relevant now as it was then and goes to the heart of the matter<sup>3</sup>: "He did not like to be required to give any pledge on the subject of the consolidation of the various statutes bearing on the subject of the income

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<sup>1</sup> Sir Alexander Johnston G.C.B., K.B.E., *The Inland Revenue*. The New Whitehall Series, No. 13 (George Allen & Unwin Ltd. 1965).

<sup>2</sup> *Hansard*, May 27, 1853. Col. 725.

<sup>3</sup> *Hansard loc. cit.* Col. 722.

tax. He was afraid the demand made was one which he should not be able to satisfy, for the Honourable Gentleman said that laws of this kind ought to be made intelligible to all persons who had not received a legal education. To bring the construction of these laws within the reach of such persons, was no doubt extremely desirable, but very far from being easy . . . The nature of property in this country, and its very complicated forms, rendered it almost impossible to deal with it for the purpose of the income tax in a very simple manner; but he concurred with the Honourable Gentleman in thinking that whatever could be done should be done; and also that when the House had determined what change it would make in the law, they should then proceed as soon as possible to get a consolidated law, not to be passed in a hurry, but to be deliberately considered, so that everything might be brought into the clearest and most connected form."

Mr. Gladstone at least showed willing. Of course, the plea today is that it would be some advance if laws of this kind were intelligible to those who *have* received a legal education. To which the riposte might be made that there is a notable absence in too many legal educations of anything which would assist the student in sorting out modern Finance Bills—but that is another topic. Mr. Gladstone's point that the complexity of the subject matter, both the tax and the situations in which it is to apply, will inevitably involve complex legislation is a fair one. As to consolidation, in 1853 Parliament would have to wait until 1918 for the next Act consolidating the Income Tax Acts, but it is only fair to acknowledge that the Taxes Management Act of 1880 was "An Act to consolidate Enactments relating to certain Taxes and Duties under the management of the Board of Inland Revenue." Certainly nothing happened in a hurry.

In that same 1853 debate, the Honourable Member for Manchester, Mr. John Bright, took exception to the extent to which the legislation under discussion relied on references to other Acts. Objections to referential legislation and pleas for consolidation are often two sides of the same coin. One of the most recent and most forceful criticisms of referential legislation is to be found in the speech of Lord Diplock in the *Joiner* case<sup>4</sup>: "The modern practice of parliamentary draftsmen in preparing for adoption by Parliament legislation to effect a change in the existing law, particularly when the subject-matter of the law is one, such as taxation, in which legislative changes are frequent, is to express the changes to be

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<sup>4</sup> *C.I.R. v. Joiner* [1975] 1 W.L.R. 1701, 50 Tax Cas. 449.

effected in the form of amendments to the language of particular provisions in earlier statutes dealing with the same subject-matter. This method of drafting becomes progressively more cryptic as amendments to previous amendments follow one another in successive statutes. The need to refer to and from and back and forth between ever increasing numbers of different statutes in order to discover what a particular provision of any of those statutes means reaches a point at which the difficulty of finding out what the law is may have the practical consequence of depriving the citizen of his right to know in advance of a decision of your Lordships' House, which must needs be *ex post facto*, what the legal consequences will be of a course of conduct which he contemplates adopting."

As to the problem of complexity, this too has been discussed in the context of codification. In 1927 a committee was established. With Lord Macmillan as chairman it included such distinguished "tax" names as A. M. Bremner, Reginald Hills, Konstam and Fergus Morton, respectively one of the first members at the Bar to be identified as a member of the revenue bar, Sir Reginald Hills the longest serving Treasury "Junior" in Revenue matters who so served from 1919 to 1957, His Honour Judge Konstam whose distinguished and pioneering text-book held the field as *the* tax text book for many a long year and Lord Morton of Henryton, outstanding chancery lawyer and Lord of Appeal in ordinary. The committee laboured mightily. A draft Bill emerged in 1936. It never passed into law. But the committee also made a report which included a number of pertinent observations.<sup>5</sup>

The Committee reviewed the material with which they were confronted when they settled to their task and continued: "But the difficulty of codifying a system of law thus embodied in a mass of statutes, decisions and practice did not arise merely from the bulk of the material. The nature of the material presented difficulties even more formidable. In the first place, as already stated, the provisions of a large part of the existing law have remained unaltered since they were drafted over a hundred years ago in relation to the social and economic conditions then obtaining in this country. In 1806 the industrial revolution was in its infancy, large areas now completely modernised were still rural and agricultural, railways were unknown, gas was just coming into use but the practical applications of electricity were still undreamt of, the modern limited liability company had not yet been devised, no Married Women's Property

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<sup>5</sup> Income Tax Codification Committee Report 1936 Cmd. 5131.

Act had been passed—but it is unnecessary to exemplify the vast changes brought about by the discoveries and developments of the nineteenth and the first thirty years of the present century, as well as by the Great War with its economic consequences. Yet the main instrument of taxation has through all these years never been overhauled in the light of the experience gained, or been adapted to modern conditions. The Legislators by adding a patch here and there, the Courts by interpreting particular provisions, and the Inland Revenue Department by devising practical expedients have enabled the system to continue to fulfil its function of raising revenue; but it is small wonder that the new wine has almost strained the old bottles to bursting point.”

By way of illustrating the point made by the Codification Committee, consider Schedule E expenses. What expenses can be deducted from a man's salary to arrive at the figure on which his tax liability is to be calculated?

The first point to note is that Schedule E as it appeared in Peel's Income Tax Act of 1842 substantially repeated the provisions of the 1806 Act. The code was drafted in the social and economic context of the reign of George III. Tax in 1842 was to be charged under Schedule E at sevenpence in the pound, “upon every public office or employment of profit, and upon every annuity, pension or stipend payable by Her Majesty or out of the public revenue of the United Kingdom.” These were the charging words in the Schedule, not at that time a schedule in the modern sense of something tacked on to the Act, but one of the five “several schedules contained in this Act, and marked respectively (A), (B), (C), (D), and (E).” Section 146 of the Act then set out the rules under which “the duties hereby granted contained in the Schedule marked E” were to be assessed and charged. There were 10 rules. The rules make clear that what was to be taxed was the pay attaching to a particular office or employment, not the office holder or employee. Pay was described as “salaries, fees, wages, perquisites or profits whatsoever accruing by reason of” the office or employment. So far as concerned officers in the public service, there were to be commissioners in each department who would make the assessments and the paymaster or agent paying the salary was to detain and stop the tax out of any money payable. No provision was made in the rules for deducting any “necessary” expenses. There was, however, provision for deducting duties or other sums payable or chargeable on the salary by virtue of any Act of Parliament; and provision was also made to the effect that if the principal in an office, out of his

salary, paid a deputy or clerk or other employee, then the principal could deduct and retain tax at the appropriate rate and the deputy, clerk or employee was to allow the deduction, precisely the same rule as applied to payments of mortgage interest or other annual payments. Also to be deducted from the salary were "all official deductions and payments made upon the receipt of the salaries . . . or in passing the accounts" belonging to the office.

We may suppose, therefore, that when in Trollope's autobiographical novel, *The Three Clerks*, Alaric Tudor accompanied the faintly ridiculous Mr. Neverbend to inspect the Wheal Mary Jane mine in Cornwall and, having reached Plymouth by train from Paddington, insisted on hiring a carriage with a pair of horses to get them to the Bedford Hotel at Tavistock, Mr. Neverbend meanwhile urging the merits and economy of using public transport, the whole matter of obtaining reimbursement for expenses incurred was mere routine. Had Tudor held an office which regularly involved journeys of inspection, as did Trollope's own job in the Post Office, it may be that he would have been expected to pay all his own expenses or that his expenses would have been reimbursed or it may be that any expenses met out of the emoluments would have been passed when the office holder's accounts were presented and the Commissioners, themselves officers in the same department, would have made allowances in the income tax assessments. What may reasonably be assumed is that there was a pattern in 1806, a social and administrative pattern, which would have remained substantially unaltered in 1842. The concept of a public office with emoluments, perhaps in the form of fees, or a stipend attached, was a familiar one. The office holder would be expected to employ his own deputy and clerks. The paymaster would pay the salary and the office holder would pay his deputy and clerks, deducting from their pay and himself pocketing, the sevenpence in the pound which would have been deducted from his salary. If the office was one where the remuneration all came in as fees, then no doubt the office holder would present his accounts each year to the department in which he served being a record of his receipts and expenses.

There must at some quite late stage have been some problem about those office holders who were required to provide themselves with a horse for getting about in the course of their duties. In 1853—and be it noted not before 1853—some familiar words appeared in section 51 of that year's Act: "In assessing the duty chargeable under Schedule E of this Act in respect of any public office or employment, where the person exercising the same is necessarily

obliged to incur and defray out of the salary, fees or emoluments of such office or employment the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively and necessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees and emoluments to be assessed under this Act the amount of all such expenses and disbursements necessarily incurred and defrayed in manner aforesaid."

The horse is still there. One hundred and twenty eight years after his late arrival in the tax code he is present, alive and kicking.<sup>6</sup> In 1806, and again in 1842, the list of public offices or employments of profit of a public nature to which these rules applied would not have been a long one. The third rule of the 10 rules set out in the Act, in fact, lists the offices which it was contemplated would be covered by Schedule E. That and the other nine rules provided a comprehensive and, there is every reason to suppose, workable and satisfactory code for dealing with tax on public offices including any questions of expenses which under the conditions then prevailing were likely to arise. Presumably there had been some change in the general pattern by 1853 and the rule as to travelling expenses was tacked on to the existing code to clear up a possible doubt and difficulty.

What happened then? As consolidation succeeded consolidation and the 1974 Act amended the last consolidated Act of 1970 the original code got hacked away and all that was left was the 1853 accretion to the 1806/1842 Schedule E code, deduction of necessary expenses; the faithful horse goes plodding on, all alone. The dog cart and the stable have long since been removed. Nor is that all. In October 1919 there came before the Special Commissioners the case of *Great Western Railway Company v. Bater (Surveyor of Taxes)*.<sup>7</sup> The question was whether a clerk in the G.W.R.'s Divisional Superintendent's office at Swindon, who was paid all of £130 a year, was taxable under Schedule E or Schedule D. If he held a public office or employment of profit of a public nature, he was taxable under Schedule E; if he merely had an employment, not of a public nature, he was taxable under Schedule D. The practical significance of the alternatives was that the basis of

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<sup>6</sup> s. 189 ICTA 1970.

<sup>7</sup> [1922] 2 A.C. 1, 8 Tax Cas. 231.

liability at that time was a three year average for Schedule D, whereas if the taxpayer was taxable under Schedule E, then by virtue of provisions which had been in force since 1860 the G.W.R. would be responsible for the tax, would pay the employee under deduction of tax on a basis which anticipated the PAYE system by some 80 years and would account for the tax to the Revenue. (Incidentally, under the 1860 provisions all assessments on railway companies in respect of their employees (if taxable under Schedule E) were to be made by the Special Commissioners). The question what expenses could be deducted did not arise and was not considered. The G.W.R. appealed against the Special Commissioners' decision that the clerk was assessable under Schedule E. Mr. Justice Rowlatt heard the appeal in June 1920. He looked at the rules in the 1842 Act regarding assessments made under Schedule E and said that what those who framed the rules meant, when they spoke of an office or employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders. In the social and administrative context of 1806 and 1842 that this is what those who framed the Acts intended seems an inescapable conclusion. It makes sense, too, of the whole system regarding expenses to be deducted in computing liability. However, Mr. Justice Rowlatt, though doubting whether the clerk held a public office or employment, reckoned that he was bound by authority in the matter and that the railway clerk was assessable under Schedule E as railway clerks had in practice been assessed for the past 80 years. The Court of Appeal threw little light on the problem. They avoided any bold or definitive conclusion by saying that the decision of the appellate Special Commissioners was a decision of fact with which they could not interfere. However, Lord Justice Scrutton made a number of relevant comments. "I agree," he said, "that our decision" — that the clerk held a public office or employment — "is not very satisfactory even to ourselves. That results from the fact that the Income Tax Acts are being worked under a system of considerable antiquity which in many respects has not been amended by Parliament. All employees whose income reaches a certain amount, which has varied from time to time, are taxable either under Schedule E or under Schedule D. Whether they come under one Schedule or the other has certain consequences . . . If they come under Schedule E, they are taxed on the income of the year of assessment and if they come under Schedule D, they are taxed on the average of the preceding

three years' income, if there is such an average; and that if they come under Schedule D, they are assessed directly and must fight out their battles with the Income Tax people by themselves, but if they come under Schedule E, they are assessed through the employer who has to pay to the Income Tax authorities and then deduct from his employee. Naturally under those circumstances it may make a difference to a man whether he is put under Schedule D or whether he is put under Schedule E." When the case came before the House of Lords in February 1922 their Lordships by four to one, reversed the decisions below, to a limited and, it may be, controversial degree endorsed Mr. Justice Rowlatt's analysis to the effect that continuity was the key to what constituted an office, and held that the railway clerk did not hold a public office or employment.

This result produced a sharp reaction. All other offices and employments were promptly transferred from Schedule D to Schedule E to join the public offices and employments already there to be found. Introducing the measure in Parliament, the Chancellor of the Exchequer, Sir R. Horne, had this to say about the transfer<sup>8</sup>: "But I should like the Committee to understand the considerations which moved us upon this matter. The decision of the House of Lords"—in *G.W.R. v. Bater*—"was, undoubtedly, a surprise, not merely to the Treasury officials and the Government but, I think, to the great bulk of people who knew anything about Income Tax law. The result was that it threw into confusion the whole basis of employees in this country, and it was hinted in that judgment of the House of Lords that something was necessary to be done, and it was obvious to the people who had the administration of the law in their hands that it was necessary to put the whole matter on a proper foundation. We decided accordingly not to take advantage of the judgment of the House of Lords, because it would have been an advantage to us at the present time, as a mere matter of money"—salaries and wages were dropping and a three year average would give a higher yield than the actual year basis—"but to bring in at once legislation which would have the effect of putting all employees of the country of the character described on the basis of Schedule E instead of Schedule D so that there would be no further difficulty." Oddly, the Chancellor made no reference to the recommendation of the 1919 Royal Commission that this change ought to be made in any event. And need anybody knowing anything about Income Tax law, as opposed to Income Tax practice, really have been surprised?

<sup>8</sup> *Hansard* June 20, 1922 Col. 1188.

In 1806 railway companies did not exist, and, if they had existed, it seems inherently unlikely that their clerks would have been taxpayers.

The more astonishing feature, however, of the switch of all offices and employments to Schedule E was that now section 51 of the 1853 Act, the faithful horse, must bear the whole burden of expenses, what may be deducted and what may not. In 1919 and 1922 the point seems to have gone wholly unnoticed. So far as noticed it was probably considered unimportant. The 1955 Royal Commission, the Radcliffe Commission, commented on the rule and the criticism aimed at it.<sup>9</sup> "There can have been no part of the income tax code which has been so regularly the subject of unfavourable notice." The report then cites 11 cases where the position regarding expenses was the subject of adverse judicial comment. The Royal Commission made recommendations. The test for deduction of expenses should be differently expressed: "All expenses reasonably incurred for the appropriate performance of the duties of the office or employment." No change in the law has as yet been made on that part of the Royal Commission's recommendations. That, however, is not the burden of my plea: I want sympathy for the horse. How could a provision tacked on to tidy up a doubt arising in the application of a code of rules designed to deal with a limited list of public offices in the early part of the nineteenth century be expected to operate adequately, let alone fairly, in relation to offices and employments in the commercial, industrial and social circumstances obtaining in the latter half of the twentieth century?

Again, the criticism is easily made. The important question is why does the situation arise which occasions the criticism? Is it no more than a matter of political considerations, the shortage of parliamentary time, the lack of any vote-catching appeal? There is another, perhaps, more significant factor. If habit is the principal justification for paying tax, and if taxpayers for the most part pay tax because they are accustomed to paying what is due, then inevitably the old code, or what looks like the old code, will be more acceptable and secure a higher level of compliance than anything new and strange. The system has its own built in justification for avoiding changes unless the advantages are explicit. There is nothing new about this. Commissions and Committees investigated and reported on the Income Tax in the nineteenth no less frequently

<sup>9</sup> Royal Commission on The Taxation of Profits and Income Final Report 1955 Cmd. 9474, para. 129.

than in the twentieth century. The Governor of the Bank of England, Hubbard, was chairman of the select committee which reported in 1861. The report was to the effect<sup>10</sup> "that the objections urged against the tax are objections to its nature and essence rather than to the particular shape which has been given to it," and the Committee declared that they felt so strongly "the dangers and ills to be apprehended from an attempt to unsettle the present basis of the tax without a clear perception of the mode in which it is to be reconstructed" that they were not prepared to offer any suggestions for its amendment.

Simplicity may be an unattainable ideal. It may be imprudent to unsettle a tax code which is operating well enough merely to eliminate antiquated and anomalous provisions. There may be justifiable parliamentary inhibitions on setting out taxing statutes in ampler form rather than relying on references to earlier and other Acts. But even the most carefully balanced review of all that there is to be said in defence of the present morass leaves this question to be answered: would we survive in commerce or industry today if we deployed attitudes attuned to an earlier style of social and economic development and if we persevered in the use of patched up plant and machinery more than 100 years after the plant and machinery was designed, to discharge a different process in a different climate? Having asked the question, I have an uneasy feeling that the answer may be: survival or not, that is just what we enjoy doing; our capacity to muddle through is unsurpassed.

Is antiquity the only factor contributing to complexity? The Codification Committee put its collective finger on another problem<sup>11</sup>: "It is not, however, only a matter of archaisms and anomalies. As already indicated, the Statutes of 1842 and 1853 were comparatively simple. The growth of legislation since 1907 and its increasing complexity have been in large measure due to the high rates of tax in operation. Those high rates have necessitated the introduction of alleviations in the interests of various classes of taxpayers, whether to mitigate opposition, or with the intention of making the system more scientific, or in response to outcries against burdens which, in many instances, had been oppressive. The space occupied by the provisions relating to such reliefs and exemptions is now prodigious, and contrasts with the comparative brevity of the

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<sup>10</sup> See the 1870 Report of the Commissioners of Inland Revenue previously referred to: chap. 1 n. 27.

<sup>11</sup> See above n. 5.

earlier code. Further, as the rate of tax has risen, ingenuity has been increasingly shown in devising methods of avoidance, and the Legislature has responded with provisions designed to make avoidance difficult. Expedients had to be devised for stopping each loophole as it was discovered, and removing each genuine grievance as it was brought to light, until the fabric has become overlaid with incongruous patches. Whilst in some cases the patches were wider than necessary, in others they proved insufficient for their purpose, and involved either the extension of the patches or the superimposition of other patches with the result that, in some instances, the additions have become almost codes in themselves, and sometimes not easily intelligible codes. Commenting on this process, Lord Tomlin in a recent case referred to the difficulty arising 'from the fact that the amendments from time to time made to the Income Tax Acts, directed as they frequently are to stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme upon which the Acts originally rested.'<sup>12</sup>

It seems to me that Lord Tomlin might have cast his net a bit wider. Not only have amendments been made without regard to the basic scheme, but there has been little in the way of acknowledgement that there is any basic scheme, or can be any basic scheme, in the Income Tax Acts. But it may be appropriate first to consider examples of the patch upon patch process identified by the Codification Committee as, one might almost say, a suppurating source of complexity.

If ingenuity was the mother of avoidance, super-tax was the father. Super-tax had enjoyed but a short run when it became necessary to counter the closely controlled company used as a receptacle for current income to be stored and released at a later stage when it could be received free of tax or subject to tax at a lower rate than would be applicable were the income to be distributed and enjoyed contemporaneously with its accrual to the controlled company. The 1955 Royal Commission described the code devised to counter the close company gambit in these terms<sup>13</sup>: "Between the years 1922 and 1939"—(But why stop at 1939? Forty years on and the patches on patches grow thicker)—"a code of sections was built up in relation to devices for using the structure of the limited company to give a person the control or enjoyment of income without its formal ownership. In the case of the investment

<sup>12</sup> *Neumann v. C.I.R.* [1934] A.C. 215 at p. 222, 18 Tax Cas. 332 at p. 358.

<sup>13</sup> See above n. 9 para. 1021;

company that is in a few hands the income from its investments is now treated as the income of its members and the Special Commissioners”—(A reference to the Special Commissioners in their assessing as contrasted with their appellate capacity)—“have full discretion to look beyond the legal ownership of shares in deciding who is to be treated as a member and to apportion the company’s income for assessment purposes in accordance with this discretion . . . Apart from the special system for these private investment companies, there is a much wider set of provisions that cover all companies that are in a few hands, these companies being defined as those which are under the control of five persons or less and in which the public are not substantially interested . . . If such a company . . . withholds an unreasonably large proportion of its income from distribution among its members, the Special Commissioners”—(Again, in their assessing capacity)—“have power to direct that the whole of the company’s income is to be treated as the income of its members and apportioned among them for the purpose of their surtax assessments.”—(By this time super-tax had become surtax)—“The test to be applied is whether a reasonable amount of the income has been distributed having regard to the company’s business requirements including requirements necessary or advisable for the maintenance and development of the business.”

The basic scheme of the close company code can thus be quite shortly summarised. But when I turn to find the code in the statutes, complication quickly takes over. The original 1922 code had been patched frequently by the time the law was consolidated in 1952. The next consolidation was in 1970. The close company code by this stage was reasonably well confined and was contained in sections 282 to 303 inclusive. But the patching process went on and, in particular, the Finance Act 1972 repealed 13 of the 21 sections, amended others and introduced a new schedule containing 20 paragraphs to be read as if included in the 1970 Act. The process of patching has thrown up amendments in 1973, 1974, 1975 and 1978. The 1980 Finance Act has introduced two new sections containing referential amendments and a new schedule which is described as abolishing the power to apportion the trading income of a trading company. There is a case to be made to the effect that the wider provisions dealing with closely controlled companies other than investment companies referred to above in the extract from the Royal Commission Report are no longer required because in the meantime corporation tax and Schedule F have been introduced and the whole basic scheme upon which the taxation of

companies and their shareholders rests has been redesigned. A case, too, can be made that many of the economic hypotheses upon which the system of making 'surtax directions' previously rested have been obliterated by inflation. Political philosophy has also played its part. The desire to please now those holding one point of view, now those holding another, has frequently dictated change. But at the end the close company code has not been redesigned, still less dismantled; it has been patched. What goes up may have to come down under the law of gravity, but what gets put on seldom enough gets taken off under the law of tax.

The Royal Commission was moved to comment<sup>14</sup>: "We are disturbed by the criticism that much of the anti-avoidance legislation is obscurely worded and drawn more widely than its purpose requires. No one who tries to read through and understand the gist of Chapter III of Part IX of the Income Tax Act 1952 (dealing with 'surtax on undistributed income of certain bodies corporate')"—What I have called the close company code—"would say that the 20 sections concerned are readily intelligible."

Unintelligibility is to be attributed at least in part to the patching process identified by the Codification Committee. The 1955 Royal Commission considered codification as a possible remedy and also noted what the earlier Committee had said on the topic. They did not disagree about the difficulties. They commented that it would be misleading to think of even a reformed tax code as being anything but detailed, elaborate and voluminous. "The reasons are not far to seek . . . Very briefly, the matter stands as follows. The social and industrial structure of the United Kingdom is intricate. It comprehends a great variety of forms. A master tax, such as income tax has come to be, which has to be applied with fairness to all that variety of forms, must reflect to a large extent the intricacy and complication of the underlying structure . . . Secondly, the high rate of tax brings certain consequences. On the one hand there is pressure for allowances, alleviations and qualifications whether a special case can be asserted or a distinction claimed. Indeed, with a high rate of tax, a distinction acquires a potential value which it would not possess in other circumstances. Moreover, the methods and process of Parliamentary legislation, particularly, perhaps, as applied to the annual Finance Act, themselves assist in the multiplication of special provisions. On the other hand, a tax which has so heavy a bearing on the lives and prospects of its

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<sup>14</sup> *Loc. cit.* para. 1029.

citizens is sure to be met with avoidance on a large scale: and the statute book becomes encumbered with elaborate provisions against avoidance, some of which rank among the least intelligible portions of English prose."

All then are agreed that tax statutes are too long, too obscure and too complex. All are agreed that they are getting longer, more obscure and more complex. The complexities of our society, inevitable high rates of tax, the importunities of worthy pressure groups, the ingenuity of less worthy groups of tax avoiders, the imperfections, here and there, of our Parliamentary machinery for presenting, reviewing and passing legislation, all these—it is argued—are to be identified as the causes of our discontents. I make no apology for citing earlier authorities extensively. They demonstrate, with authority, that the problem is deep-seated, of long standing and inherent in the subject matter. Failure to identify the problem, to grapple with the difficulties and to persist at least to a point of partial solution is not to be attributed to the wickedness of any one group or to be explained by the alleged incompetence or inadequacy of any agency or any body of advisers involved in the process of making, applying or revising our tax law. But there does seem to me to be a general failure of nerve: panache is missing. By that I mean this: we are insufficiently interested in the basic principles. Who teaches tax as a coherent branch of the law? What interests the profession? They will tell you all there is to know—and more—about the law and the practice, about the latest anti-avoidance device, about the meaning of the latest set of judgements from the Court of Appeal or the latest set of apparently inconsistent speeches from the House of Lords. But when will they base advocacy on the potential coherence of the tax code? When will judges be invited to construe provisions in taxing statutes as part of a scheme designed, however imperfectly, to produce a reasonable result? When, in short, will confidence return that, within the familiar limits of our legal system, it is no less possible to predict how a tax question will be answered than to suggest how a problem in the common law will be resolved? When will it be possible for the practitioner to look with confidence at his client, straight in the face, and say: "You know, the law on occasions may be an ass, but the tax law is not currently as assinine as that!" The outlook is not entirely gloomy. Largely thanks to the heroic pioneering efforts of Professor Wheatcroft tax is more widely taught than ever before and not just as a practical craft. Systematic and comparative study must lead to increasing comprehension, comprehension to coherence. In any individual case the taxpayer's

advocate may well strive to win the taxpayer's case by whatever argument is to hand. But it would do less than justice to those responsible for putting the Revenue's case to doubt their concern to present the tax code as a coherent whole. If those outside the inner circle sometimes hear the theme but faintly, their listening or hearing may be at fault. The Courts' cooperation with Parliament may also be on the way towards achieving more sensible results.

There are grounds for hope. One moral tale, a sort of Beatrix Potter tax tale with a happy ending, and three more recent gleams of light.

Harking back to the history of tax soon establishes that there is little that is new by way of complaint or comment. The title page to Dowell's first edition, published in 1874, reads: "The Income Tax Laws At Present in force in the United Kingdom with Practical Notes, Appendices and a Copious Index by Stephen Dowell, M.A. of Lincoln's Inn, Assistant Solicitor of Inland Revenue." Tax lawyers have always had reason to be grateful to members of the Solicitor's office and to other lawyers in the Revenue for finding time to put pen to paper for the benefit of their own and subsequent generations. In the introduction to his second edition, 1885,—he had lost his notes for the introduction to his first edition in a fire—Dowell recalls the statutes with which he must have become familiar when writing his notable *History of Tax*. He compares "modern" statutes with those of an older pattern. After referring to marginal notes he continues: "This useful aid to those who are desirous to make themselves acquainted with the contents of a bill is not the sole improvement to be observed on a comparison of the modern with the antecedent practice in relation to bills; their form is now studied more carefully than heretofore, and the difference to be noted between the new and the old consists mainly in the following particulars:—

1. The absence, as a rule, of recitals, which, speaking generally, are unnecessary, while they are liable to give rise to questions and to be misleading;
2. The division of the act into parts, when it deals with several distinct subjects, or the subject divides itself easily into different branches;
3. The short title to the act with the year of our Lord in which it passes given for convenience in reference to the act;
4. The interpretation or definition clause as containing not only definitions of terms necessary to a correct understanding of the enactments, but also abbreviations of expressions,

- with a view to avoid the necessity of repeating them at length throughout the act;
5. The curtailment of sentences, for which purpose the sections are frequently divided into subsections;
  6. The enactment of penalties for any contravention of the regulations of the act, in a sentence subsidiary to the regulations, in lieu of the full penalty clause of former times. This is copied from the French: *toute contravention aux dispositions de cet article emportera une amende de, & c;*
  7. The more frequent use of schedules, more particularly to contain any regulations which may be altered by some constituted authority;
  8. The absence . . . of enacting words for every section; and
  9. The omission of the usual section to provide that 'the act may be amended or repealed in the same session of parliament' as, also, no longer necessary since Lord Romilly's act. . . .<sup>15</sup>

"These points of difference," Dowell continues, "between modern acts of parliament and those of half a century ago are to be observed in taxing, as well as in other, acts; and indeed, the single peculiarity in the form of a taxing act consists in the recital, in the preamble to the act, of 'the free and voluntary resolution of the Commons to give and grant the tax'; in other respects fiscal resembles ordinary legislation. Taxing acts have, however, this speciality: that while they deal with subjects of no common intricacy, and are liable, in a remarkable degree, to those perils in the birth of acts which arise from alterations in the bill, made while it is in committee, and not subsequently submitted to the framers of the measure for revision, no other kind of legislation touches, personally, so great a number of individuals, or touches them in so tender a part; while experience proves that the attempt to evade the provisions of a taxing act has in it some peculiar charm for Englishmen. Hence questions have arisen, arise, and will arise on fiscal points notwithstanding the greatest care to prevent them.

In modern times great care has been taken in the preparation of fiscal legislation; but, could absolute perfection in expression be attained, were a taxing act to be created in every respect a model of exactness and lucidity in its language, it, probably, would still fail to present, in every part, a front so impregnable to attack as to deter from the attempt all those who are touched by the act, in the

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<sup>15</sup> Lord Romilly's Act 1850, (13 & 14 Vict. c. 21), s. 1.

breeches pocket, to many of whom, if we may judge by experience, it is a pleasure to endeavour to find a weak point in it at any risk."

Dowell's list of improvements in the preparation of Bills may to us seem commonplace. But that is the point. It was 50 odd years before the natural impediments to change in this sort of area were overcome. Why should we be luckier? But why should we not be as lucky? It would be invidious, indeed I sometimes wonder whether it might not result in a sojourn in the Tower, to name names or identify culprits. These things inevitably take time; but quite small changes of procedure, of style, of habits, could be made and, just as in Dowell's day, quite remarkable improvements would result. What happened in his day is unimportant now. What is reassuring is that it was simple, it happened and the situation improved. So may we hope.

We may take comfort, too, from Dowell's cheerful realism. Of course, reactions are different when the touch is in the breeches pocket. "A fellow feeling makes us wondrous kind"—so runs the doggerel and there will be endless concern about this or that Bill which touches upon some remoter, though none the less deeply felt, social problem. But let the boot be directed towards the breeches pocket—"I wonder would the poet have changed his mind if turning in a crowd he'd chanced to find a fellow feeling in his coat behind."

As to the gleams of light. First, the Radcliffe Royal Commission. "We do not feel satisfied," they said,<sup>16</sup> "that it is impossible to introduce greater clarity and concision into the drafting of income tax legislation. The point is so often a matter of public criticism, and for more than a generation it has been a subject of judicial complaint." An anthology of judicial censure might be compiled. (Let us face it. The anthology might not all be of censure directed one way.) But they continued: "We remain under the impression that the possibilities of an improved technique are not exhausted and some advance could still be made in the way of clarity." They concluded by mentioning two lines of advance which might be worth exploring: the use of specific illustrations as part of the statutory text, and a preference for clear statements of principle in a brief enactment over detailed attempts to cover by anticipation all imaginable evasions of it. As to the first of these lines of advance, as one whose claim to literacy is not quite so shaming as his claim to numeracy, I cannot pretend that I would welcome any attempt to turn Finance Bills into mathematician's playgrounds. If numbers are

<sup>16</sup> See above n. 9 para. 1087.

needed and examples help, it seems to me that the standard of the explanatory leaflets made available by the Revenue has improved beyond recognition—(if the leaflets and booklets, why not the statutes?)—and that the examples contained in them should meet most demands for numerical exposition. As to statements of principle, a warm welcome indeed to the suggestion and a warmer welcome still should any government get round to implementing it. The usual caveat must be entered: it takes two to make poetry, the one who writes and the other who reads, receives and reacts. A statute needs an interpreter: to that topic I must come in due course.

The second gleam of light came in 1967.<sup>17</sup> Under the chairmanship of Lord Scarman and the guidance of Professor Wheatcroft a one-day conference took place to discuss tax legislation. If memory serves, the Revenue were represented and practising lawyers and accountants were present, and the Parliamentary Draftsman. The lion and the lamb, it might be said, were on the same field with an eagle perching proper hardby. Of course, it could not last. Parliamentary Draftsmen have their remote eyries. They have to—for protection. Otherwise, no doubt they would be mobbed. Nor is it the way in which such matters are dealt with that we should know whether or why the Law Commission is thought to have no fiscal function. But suggestions emerged.<sup>18</sup> First, that those concerned should press on with consolidation. The 1970 Acts followed and since then we have had the Capital Gains Tax Act 1979. Second, that there should be some kind of permanent body with suitable representatives upon it of the practising professions and of the “official” side charged with the task of reviewing sections of the existing law and making suggestions for revision or redrafting. The suggested alternative of a Parliamentary Select Committee was also touched upon. Third, that the possibility of modifying the existing rules as to budget secrecy might be explored with a view to promoting discussion and consultation on the technical and legal aspects of tax legislation before it comes to Parliament. Clearly much has been done and is being done to increase and improve the consultation which does take place, at least with certain groups and interests, in advance of legislation. More, perhaps, needs to be known about what facilities and opportunities exist and what success is achieved. Certainly progress with consultative papers has

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<sup>17</sup> See “The Present State of the Tax Statute Law,” G. S. A. Wheatcroft [1968] B.T.R. 377.

<sup>18</sup> B.T.R. *loc. cit.* at p. 390.

been made. Problems relating to Capital Transfer Tax and settlements have been aired. Sceptics may remain dubious. Others will acknowledge with approval a readiness to receive suggestions and ideas. As emerges in relation to the third gleam of light a solution in relation to the legal aspects of tax legislation is still elusive.

The third gleam came in 1977. Sir Geoffrey Howe Q.C., M.P., addressed the Addington Society.<sup>19</sup> He described the defects in what he called the present ritual and made an eloquent plea for gradualism as contrasted with some bold master stroke of the "set all to rights with a Royal Commission" kind. He concluded with a short list of modest but none the less relevant proposals: that exposing drafts well in advance of bills should be the practice rather than the rare exception; that significant changes in structure and shape should always be foreshadowed by suitably coloured papers or draft bills; that budgetary provisions might be separated from machinery and technicalities; that some form of parliamentary scrutiny should be devised to keep fiscal measures and fiscal proposals under review in an atmosphere lacking the abrasions of the adversary relationship but enlightened by flashes of expertise. Sir Geoffrey also acknowledged the good sense in the Renton Committee's proposal that a suitably qualified committee might have the task of putting forward proposals for amendments to correct situations that are seen to be anomalous, unworkable or a source of confusion or injustice.

The similarities between the different suggestions repeatedly made will be obvious. When so much has been said, can action be so far behind? Sir Geoffrey Howe is today a busy man. He carries with him the non-partisan good wishes of his many friends for his success in the tasks which confront him. He also carries their hopes; hopes that his practical energies, enthusiasm and persistence in execution will not fall short of his sound good sense and lively wisdom in preliminary discussion.

Tax legislation lacks charm. It has a poor name and a worse record. (Whether name and record are better or worse than those of other branches of the law remains open for argument. Candidates from the statute book calculated to win any competition for obscurity and complexity are not in short supply.) Given goodwill, co-operation and a readiness to accept something short of perfection, measures to improve the existing law and such additions to it as are on mature reflection really necessary should not be difficult to achieve. Parliamentary procedures seem to hold the key; some sort

<sup>19</sup> See "Reform of Taxation Machinery," Sir Geoffrey Howe [1977] B.T.R. 97.

of permanent committee, with experienced and expert assistance, to review existing and future legislation not just in relation to its content but in relation to its form seems to offer a practical expedient worth a try. Is the will lacking? Should we all shout together? We might be heard.

## CHAPTER THREE

### THE JUDGES' ROLE

Parliament's part is to pass the laws, the courts' and the judges' part to apply them. Until 1874 the courts and the judges did not have a lot to do with applying the law relating to income tax; the General Commissioners, and to a minimal extent the Special Commissioners, dealt with such disputes as arose. If, around the middle of the nineteenth century, you were an honest and small town tradesman and had a small, local business, you were required by section 111 of the 1842 Act to put in a statement of the profits and gains of your business with a view to being assessed on a three year average under Schedule D. The assessor, a locally appointed functionary, was responsible for letting you have a return form. He obtained the forms from the Revenue Department's representative, the surveyor. This officer would have an opportunity to look at your return when you sent it in and before it went to the Additional Commissioners, who would make the assessment. The surveyor might subsequently consider the assessment too low in which case he would suggest an increase to the Additional Commissioners and if they did not accept his suggestion, he could take the matter to the General Commissioners. The General Commissioners were appointed by the Land Tax Commissioners from among their own number and they in turn appointed the Additional Commissioners, whose property qualification was half that of the General Commissioners.

I recall in the nineteen fifties, (just a century after the period to which my example relates), a case in the Divisional Court involving General Commissioners who had got into something of a muddle as to the party in whose favour they had decided an appeal.<sup>1</sup> At the hearing they had apparently found one way but at a later stage reversed themselves. Before the Divisional Court, presided over by Lord Goddard, the question was suddenly asked "who appointed General Commissioners?" Some difficulty was experienced by those available in court in finding the answer but eventually it emerged that the situation was as it had been 100 years and more ago. Shortly afterwards the responsibility for appointing General Commissioners was handed over to the Lord Chancellor's Department.

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<sup>1</sup> *Rex v. General Commissioners of Income Tax for the Division of Morleston and Litchurch*, 32 Tax Cas. 335.

The wording of the surveyor's right of appeal is not without interest. Section 112 provided that where the surveyor or inspector should apprehend the determination made by the Additional Commissioners to be contrary to the true intent and meaning of the Act, and should then declare himself dissatisfied with such determination, it should be lawful for him to require them to state specially and sign the case upon which the question arose with their determination thereupon. It was then for the surveyor to transmit the case to the General Commissioners. If you were the taxpayer and should think yourself aggrieved by an assessment made by the Additional Commissioners, you had a similar right of appeal to the General Commissioners. At that stage the General Commissioners could require you to submit a schedule giving details of your income and you could further be required to attend and verify the schedule on oath. Section 123 provided that the General Commissioners could put questions to the taxpayer and "every person required to make such answers, or appearing before the said Commissioners to be examined as a party, or as the clerk, agent, or servant of such party, shall be permitted to give his answers either in writing as aforesaid or *viva voce* . . . and shall be at liberty to object to any question, and peremptorily to refuse answering the same." The Commissioners were given a similarly limited power in the matter of summoning witnesses. They could not summon "the clerk, agent or servant of the person to be charged, or other person confidentially instructed or employed in the affairs of such party to be charged." As I have indicated at an earlier stage, no doubt what was intended to happen was that the taxpayer either disclosed his affairs adequately, or had to accept the assessment suggested by the surveyor. When finally the Commissioners had extracted such information as the taxpayer was willing to impart, their task was to fix the assessment and the assessment so made was final and conclusive.

It is to be noted that the surveyor's powers were extremely limited. Effectively he could do no more than prompt the commissioners. In turn their powers were limited. They were not so much required to adjudicate in a dispute between two parties as to participate in an administrative process, conducted in a quasi-judicial manner to arrive at a figure. The wind was indeed tempered to the lamb about to be shorn. When numbers were less and local circumstances, well known to all participants, and when matters could be dealt with quite soon after the event, the system must have worked well enough. But the powers of the commissioners and inspectors to pursue enquiries have remained largely unchanged

over the years. The social and economic surroundings in which those powers are exercised have changed considerably. In the context of cases involving default or neglect when the onus may be on the inspector to establish liability, or in relation to modern anti-avoidance provisions where complex situations have to be shown to exist if the provisions are to apply, some might take the view that the powers are inadequate and less than effective. The wind is not merely tempered but positively deflected. It is welcome news, therefore, as gleaned from a recent parliamentary answer,<sup>2</sup> that Lord Keith of Kinkel is to preside over a committee charged with the task of enquiring into the adequacy of these powers in today's context. The Committee has invited comments and indicated heads under which suggestions would be welcome.

It is not clear whether the difference in wording between the surveyor's right to have a matter reviewed and the taxpayer's right of appeal was intended to be significant. The surveyor could refer the case to the General Commissioners if he apprehended the determination of the Additional Commissioners to be contrary to the intent and meaning of the Act, the taxpayer if he thought himself aggrieved. Clearly the surveyor was not to indulge his emotions; whether he could raise issues of fact is less clear. No lawyer was around to object if he did so and, no doubt, in practice, he had a fairly free hand.

Why were the lawyers kept out—a Utopian state indeed?<sup>3</sup> As previously I have tried to show, Pitt was positively apologetic when he introduced the tax and Peel made no extravagant claims for its perfection or its permanence when it was re-introduced. Even in 1853 Mr. Gladstone was only proposing to impose the tax for seven years, at seven pence for two years, six pence for the next two years and five pence for the last three years. And as late as 1874 he was campaigning on the basis of Liberals in and income tax out. Why then make a fuss about a temporary tax at a modest rate? In any event, who would wish their affairs to be disclosed? Pitt had sought to assuage the tradesman's clamour by providing commercial commissioners to make assessments at the tradesman taxpayer's option in place of the local worthies who might be supposed to be too inquisitive about the tradesman's resources and reserves. Peel covered the point by making available alternative assessment by the Special Commissioners, to whose origins, functions and subsequent

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<sup>2</sup> Parliamentary Answer. See *Hansard*, H.C. Deb., Vol. 988, col. 683.

<sup>3</sup> *c.f.* Shakespeare, *King Henry VI*, Pt. II, iv, ii.

history I shall return at a later stage. The Commissioners of Inland Revenue summed up the position in their 1870 Report<sup>4</sup>: "The appointment of Special Commissioners was the most important new feature introduced by the Act of 1842 into the income tax system of Mr. Pitt. The principal object of their appointment was to afford to persons chargeable under Schedule D"—the growing trading and commercial community—"the means of avoiding the disclosure of their affairs to their neighbours. For this purpose, it is provided that any taxpayer making a return under that schedule may claim to be assessed by the Special Commissioners instead of the Commissioners of the district. His return is, in that case, delivered under seal to the surveyor, and the whole of the proceedings are then conducted by officers appointed by the Crown. Should the taxpayer be dissatisfied with the charge, he is at liberty to apply to the Special Commissioners to be heard in person by way of appeal, and either he or the surveyor can, if dissatisfied with the decision of the Special Commissioners, demand that a case shall be stated for the opinion of the Board of Inland Revenue." To a jaundiced modern ear, this description of the procedure applicable in former times comes like a breath of vernal innocence. But, surprise mastered, the passage quoted discloses an interesting state of affairs. It is clear that then as now the central government official was regarded with suspicion. Had not Dr. Johnson—as so often—set the Englishman's seal of disapproval on a particular group when in his dictionary he defined Excise<sup>5</sup> as "A hateful tax levied upon commodities, and adjudged not by the common Judges of property, but wretches hired by those to whom Excise is paid."? The same would in due course, and was, said about odious officers of Revenue. But even this distaste was thought to be likely to be suppressed in the face of the neighbour's curiosity.

The way Peel himself put it to Parliament in March 1842 had been as follows.<sup>6</sup> "Although, however, it is more consistent with former usage to employ local parties in each neighbourhood to collect the tax, yet a great objection has been raised to their sitting in appeal on the affairs of their immediate neighbours. It has been peculiarly objected that it is inexpedient to produce before their neighbours, or those who might stand towards themselves in the relation of friends or of personal or political enemies, these accounts,

<sup>4</sup> See Chap. 1 n. 27.

<sup>5</sup> Cited in the Report of the Committee on Ministers' Powers, 1932. Cmd. 4060 at p. 11.

<sup>6</sup> *Hansard* March 18, 1842 Col. 912.

and divulging to them their true state. I propose, therefore, to appoint other persons, and to give an option to the parties. I propose that the Tax Office should appoint a certain number of persons to be named special commissioners, and I propose that these special commissioners shall have all the powers of hearing appeals which the commissioners for general purposes possessed under the Act of 1806. I propose then that the party shall have full power of going before the committee of general purposes if they so pleased, but if they preferred it the appeal might be heard by the special commissioners, under the control of the Government, and appointed by the Tax Office, which commissioners will be sworn to secrecy. I propose then, that at the option of the party, the appeal may be heard by these special commissioners. The decision that these special commissioners may come to will of course be final." That last "of course" in Peel's comment seems pretty final too. Peel must have overlooked the beneficent provision contained in what became section 131 of his Act to the effect that if taxpayer, inspector or surveyor "shall apprehend the determination of the said commissioners for special purposes on such appeal to be erroneous in any particular, and shall then express himself dissatisfied therewith" the commissioners were to state the case on which the question arose and transmit it for their quite final opinion to the commissioners of stamps and taxes who subsequently became the Commissioners of Inland Revenue.

If anyone doubts the tenacity and emotion with which intelligent men will guard the secrets of their incomes, let him consider the experience of the Senate of the Inns of Court and the Bar in endeavouring to compile accurate information regarding barristers' earnings to lay before Sir Henry Benson's Royal Commission on the provision of legal services. The record is available for all to read.<sup>7</sup> Even with guarantees of anonymity the details were extracted with difficulty, the record, though reliable enough for the purpose, was incomplete. Obviously, Peel, either on his own judgement or on advice, regarded the confidentiality aspect as crucial and, seemingly, as rendering desirable the exclusion of any procedure for appealing to the judges. Available figures scarcely support the judgement or the advice. An extract from the 1870 Report, cited above,<sup>8</sup> discloses the position: "The following statement shows the number and

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<sup>7</sup> The Royal Commission on Legal Services 1979. Cmd. 7648-1, Final Report, Vol. Two, Part B, page 582.

<sup>8</sup> See Chap. 1, n. 27.

amount of the assessments made by the Special Commissioners in Great Britain in 1868-1869. Special assessments (not including those on railways or their officers, on foreign and colonial dividends, and on mines) 2,388 [The excluded items show the ragbag of "special purposes" allocated to the commissioners for such purposes by this date].

Assessments on railways	194
Assessments on railway officials	7,000
Assessments on mines and quarries	56

The whole number of persons assessed under Schedule D in Great Britain is 380,000 and it is matter of surprise that so small a proportion should avail themselves of the secrecy which is ensured by a special assessment."

Matter of surprise indeed. Perhaps, the whole secrecy thing was a canard, one of those myths by which we regulate our affairs long after the message has become irrelevant. Certainly at least one member of parliament thought so. In 1853 a Mr. Michell is recorded as saying<sup>9</sup>: "As for secrecy under the present machinery of the tax, it was out of the question. The returns men made were often found in the butter shop, and cheese had been sent to his own house wrapped up in his own return."

Eventually the judges were let in on the Act. What became section 59 of the Taxes Management Act 1880 came into the code as section 9 of the Customs and Inland Revenue Act 1874. There is tantalisingly little information available as to why the change was made. The form of the provision was clearly borrowed from the earlier models<sup>10</sup>: "Immediately upon the determination of any appeal under the Income Tax Acts by the general or special commissioners, the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction and having so done may, within 21 days after the determination, by notice in writing to their clerk, require the commissioners to state and sign a case for the opinion of the High Court." The expression of what one wit has called the statutory emotion, the expression of dissatisfaction, has become a meaningless ritual. In the earlier patterns, if a surveyor thought the commissioners had got the law wrong, he expressed his dissatisfaction and asked the commissioners to state the case on which the question had arisen so that the question could receive an authoritative answer

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<sup>9</sup> *Hansard* May 27, 1853 Col. 729.

<sup>10</sup> See s. 131 ITA 1842. Above p. 12.

from the commissioners to whom the responsibility of adjudication was assigned. In 1874 the introduction of a specific period of time within which a case could be demanded turned the expression of dissatisfaction into a separate, distinct procedural, and quite unnecessary, step. The 1955 Royal Commission commented: "The law requires that the intending appellant should declare his dissatisfaction with the decision immediately after it has been given; he must then follow up this declaration within 21 days with a notice in writing. It was suggested to us (and a similar suggestion found favour with our predecessors in 1920)<sup>11</sup> that the condition requiring the immediate expression of dissatisfaction should be abolished as unnecessary. Indeed the case against it is not merely that it is unnecessary: it is also that it is capable of providing a trap for the unwary and of depriving a taxpayer of the right of appeal for no sufficient reason." Reasons for retaining the requirement were then discussed and the conclusion reached: ". . . giving all due weight to these reflections the fact remains that this condition is an unusual one which is capable of bearing hardly upon the taxpayer, particularly the appellant in person. On balance we think that it would be fairer to remove it and we recommend accordingly."

Of course, in practice, the appellant in person tends to be protected by the commissioners who hear his appeal. If they have found against him and there is the slightest possibility that a point of law might be argued in his favour, they will explain the position and invite the unsuccessful appellant to express his dissatisfaction. Indeed, on one heart-warming occasion it is understood that a Yorkshire appellant, asked whether he was dissatisfied, gave the rousing reply: "Dissatisfied? I'm downright disgusted."

The Royal Commission suggests that the condition is unusual. A glance at the earlier patterns suggests to me that it was accidental. It came in merely because the words used quite naturally in earlier statutes were rearranged and in due course the altered form was interpreted as meaning that there must be a separate step, a formal declaration of dissatisfaction, at the conclusion of the hearing. The procedure for framing fiscal statutes makes no provision to cover that sort of point. There is no one, seemingly, whose task is to look at the draft, as a lawyer with experience of the procedure might look at it, and raise the question how it will work in practice. The point is trivial—and boring. Why should time be wasted on it? As trivial and boring, perhaps, as the transfer of all employments to

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<sup>11</sup> Cmd. 615, para. 590.

Schedule E with the consequences which that had on deductions for expenses and the taxing of benefits in kind. On the requirement of a formal expression of dissatisfaction the 1920 Royal Commission, however, recommended a change. The 1955 Royal Commission repeated the suggestion. Those familiar with the law will know, and others will not be surprised to hear, that there has been no change. Nor has the fee required if a case is to be stated, changed: £1 in 1874, it remained at £1 in 1974. Would that the rate of tax had stayed as steady.

How then did the judges fare when they entered the ring after 1874? As was said of the lion in the case of "Albert and the Lion" you could see that the judge did not like it. Here was a topic of which few, if any, judges had professional experience, though all no doubt had disagreeable personal experience. The topic was entirely statutory, scattered in addition over a multitude of statutes, and apparently lacking in any discernible principles. What could a judge do but fall back on the words of so much of the statutory code as was brought to his attention? What was the plain meaning of the words used? If Government was to interfere with property, pry into a man's affairs and take his money, one thing was certain—there must be clear statutory authority. Parliament was the starting point—so be it. There could be no taxation without representation: that was not just an entertaining historical anecdote, it was the stuff of society, the faith of our fathers. And if Parliament intended to tax, it must have said so clearly.

The books tend to cite Lord Cairns in *Partington v. Attorney General*<sup>12</sup> as delivering the first authoritative guidance on how to construe a taxing statute. The case was heard in 1869 and therefore preceded by several years the arrival of cases stated by General and Special commissioners before the courts. The claim was for probate duty. Two ladies had died intestate, the second to die being the next-of-kin of the first. The children of the second sought to recover the assets of the first and the Revenue sought probate duty, twice over. The claim sounded harsh, though reasonable enough by reference to the scheme of the tax. "As I understand the principle of all fiscal legislation, it is this:"—said Lord Cairns upholding the claim for tax—"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the

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<sup>12</sup> (1869) L.R. 4 E. & I. App. H.L. 100.

law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Adherence to the statutory words has been the judicial motto, at least in relation to the second of the two situations considered by Lord Cairns, when tax is claimed but liability is not clearly imposed. Moreover it is adherence to the words rather than to the sense, to what the statute says rather than to what the statute means. I cannot help but wonder from what source Lord Cairns learnt the principle of fiscal legislation. He had been Solicitor General and Attorney General, and as member of Parliament for Belfast had been present, for example, when the bill which became the Income Tax Act 1853 was debated in the House. He cannot have been unaware of the problems of communicating Parliament's will to the judges in the form of Acts.

It is stranger to find Lord Cairns commending adherence to the letter and neglect of the intendment of a fiscal act when in the same volume of the law reports he is to be found taking note of the intention of legislation. In *Hammersmith and City Railway Company v. Brand*<sup>13</sup> their Lordships held that the Land Clauses Consolidation Act and the Railways Clauses Consolidation Act do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of his property has been actually depreciated thereby. Lord Cairns disagreed. He rejected the narrower construction adopted by the majority, that compensation was only due for damage sustained when the authorised works were carried out being damage directly occasioned by the carrying out of the works. He reviewed the Acts as a whole and concluded that the landowner had no direct claim against the Railway Company in respect of works which were positively authorised by Parliament. He continued<sup>14</sup>: "That fact alone would certainly predispose the mind to find, in the enactments upon the subject, compensation given, in some form or other, for the loss which beyond all doubt, the landowner in such a case

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<sup>13</sup> L.R. 4 E. & 1 App. H.L. 171.

<sup>14</sup> At p. 215.

sustains. I do not mean to say that it would be safe to strain the words of an Act of Parliament on account of considerations of that kind, but if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the parliamentary powers." A little further on in his speech Lord Cairns put the example of an Act authorising the taking of land to make a gas works or copper smelting plant: "Supposing Parliament authorised the gas works or the copper smelting works to be constructed, by words of enactment which would make it impossible for the owner of the adjacent land to maintain an action for the injury sustained, and then Parliament said: 'If by the execution of these works the neighbouring owners sustain any damage you shall pay for such damage,' I should understand by an enactment of that kind, not that the neighbouring owner is supposed to be likely to sustain damage by the construction of the building . . . but to sustain damage by those works as active going works, which are there for the purpose of manufacturing gas or smelting copper, as the case may be; and that when Parliament said: 'If by the execution of these works' it meant if by the works, qua gas works or qua copper smelting works, continuing to exist and actively proceeding, any damage is done, that damage shall be paid for."

Why was Lord Cairns prepared to take a wider view where compensation was the issue and a narrower view if tax was in point? Was it just loyalty to the tradition, doubtless inherited through Blackstone, that subjects should be relieved of burdens more readily than burdens should be imposed upon them, particularly if the burden is a tax burden? A Parliament which derived its authority to levy tax from the Glorious Revolution could not be supposed to have exercised that power save by words clearly imposing the burden of tax upon the individual. Lord Cairns himself suggested an explanation in *Pryce v. Monmouthshire Canal and Railway Co.*<sup>14a</sup>: "The cases which have decided that taxing Acts are to be construed with strictness and that no payment is to be extracted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any a priori liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any

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<sup>14a</sup> (1879) 4 A.C. 197 H.L.

supposed relationship of the taxpayer and the taxing authority could be brought to bear on the construction of the Act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequence."

Notwithstanding the tradition that Parliament could only be supposed to have taxed a man if it said so in clear and unambiguous terms, it seems at least possible that the rule of construction was not always quite as rigid as it became after the time of Lord Cairns. For example there is a significant footnote in some editions of Blackstone's Commentaries in Chapter 8, which under the heading "of Persons" deals with tax. The editions were edited by Edward Christian, Downing Professor of Law at Cambridge. The footnote reads: "It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favour of the revenue. This rule is agreeable to good policy and the public interest; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts." The reconciling factor may be "ambiguity": after all, one man's ambiguity is another man's clarity. As late as 1899 Mr. Justice Wills questioned whether there was any distinction to be made between construing taxing Acts and other Acts. In *Styles v. Treasurer of Middle Temple*<sup>14b</sup> he said "I quite agree that every tax, if it is to be supported at all, must be found within the clear language of an Act of Parliament, but I am myself rather disposed to repudiate the notion of there being any artificial distinction between the rules to be applied to a taxing Act and the rules to be applied to any other Act. I do not think such artificial distinctions ever can help anybody in arriving at the true meaning of words."

The question do you look at the scheme of the Act or must you take the scheme as you find it in the particular words which you have to construe is a question which arises repeatedly in applying taxing acts. Two recent Court of Appeal decisions may serve as examples. In the *Garvin* and *Rose* cases<sup>15</sup> shares in a company carrying a controlling interest were sold. Subsequently the purchaser procured the payment by the company of an abnormal amount by way of dividend. The one word which had to be construed was "whereby." In the *Hammersmith Railway* case it was "by." Was the purchase of a controlling interest in shares of a company pregnant with dividend a transaction "whereby" the dividend was subse-

<sup>14b</sup> (1899) 68 L.J. Q.B. 1046; 4 Tax Cas. 123.

<sup>15</sup> *I.R.C. v. Garvin and related appeal* [1980] S.T.C. 295.

quently delivered and received? If it was, liability for tax was established. If not, not. Whether the purchaser would procure the payment of this dividend was expressly found to be "an open question" when the shares changed hands.

The conclusion reached by Lord Justice Buckley was that the purchase was not a transaction "whereby" the dividend was subsequently received: "I do not feel able to accept the view that the fact that the purchaser of shares acquires the whole of the share capital of, or a controlling interest in, a company which has large undistributed profits can by itself afford a sufficient ground for holding that such acquisition was the cause of a subsequent distribution of those profits by way of dividend." To the same effect Lord Justice Donaldson: ". . . the only connection between the receipt of the consideration [for the sale of the shares] and the transaction whereby the dividends were paid . . . was that [the purchaser] would not have received the dividends if it had not previously bought the shares from the taxpayers and retained them until the time when the dividends were paid. The purchase of the shares and the associated consideration were conditions precedent to the receipt of the dividend, but there was no other connection. The distinction is between a sequential connection and a consequential connection. And [the relevant section] requires a consequential connection which is wholly absent in this case."

Lord Justice Templeman disagreed. "A purchase of a controlling interest in shares of a company pregnant with dividend is a transaction whereby the dividend is subsequently delivered and received. No other construction [of the relevant paragraph of the section] is consistent with the express words and object of the paragraph." The object? Ought the Lord Justice to have looked at that? Ought he not merely to have regarded the words used—"a transaction whereby"?

The second example is to be found in *Berry v. Warnett*.<sup>16</sup> In consideration of a payment by B, A transferred property to C to be held on certain trusts. Was A's transfer covered by the words in the statute, "a gift in settlement"? Lord Justice Oliver analysed the argument of Counsel for the Revenue as an invitation to read the words "a gift in settlement" simply as meaning "a settlement" or "the making of a settlement." "That," he said, "would make much more sense if one has regard to what the legislation was trying to achieve, but it is not what the Act says, and unless the Court is

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<sup>16</sup> *Berry v. Warnett* July 15, 1980 Court of Appeal decision summarised in [1980] S.T.I. 514.

entitled to put a gloss on the term in order to bring within the subsection a transaction of a type which the draftsman almost certainly did not contemplate, I do not think either that the reference to a gift can be simply ignored or that the word can be given a meaning which it does not naturally bear. That approach to construction is not, as I understand the authorities, permissible in the case of a taxing statute."

Lord Justice Ackner duly referred to the authorities which require a taxing act to be construed by looking merely at what is clearly said. There is no room for any intendment. No equity. No presumption. And, seemingly, no logic. This last suggestion the Lord Justice accepted from Counsel. It is not immediately apparent why the hope of finding logic in an Act passed as recently as 1965 should be abandoned without even a search. But there it is. My purpose is not to quarrel with the conclusion, merely to illustrate the rules by which the judges find themselves constrained.

Lord Justice Buckley took a different view. Whether he was on the side of the angels in this case or in the earlier case I would hesitate to say. That would be flying too high. What he said was: "[Counsel for the taxpayer] has submitted that we should not concern ourselves with what the apparent design or policy of the statute is. He has reminded us . . . that in construing a taxing statute one has to look merely at what is said without regard to intendment. When what is said is clearly said, this is no doubt so; but I do not think that the expression 'a gift in settlement' is a clear one. One must first construe the Act in order to discover what it says in this respect, and for that exercise the context of the enactment as a whole is, in my opinion, clearly not only a legitimate aid but one to which the Court is bound to have regard."

This, then appears to be the judge's dilemma. If looking for the meaning of a taxing statute, he must reject as indications the intendment of the Act, the scheme of the Act, the purpose of the Act, the logic of the Act. His eyes must be fixed on the words, and the words alone, which he is called on to construe. If the words are clear, his task is over. He takes them, he applies them; down tumbles the sky, but the rules of the game have been observed. If, however, the words are blurred, if they are not clear, then he may, nay he must, look at the context in which they are found and construe the Act as a whole.

Have you, I wonder, ever stood on the deck of a small boat when making a landfall and scanned the horizon? To one observer

the distant headland will bear a striking resemblance to Bolt Head. To another it will appear as Berry Head. To yet another all will be obscure in the absence of other points of reference. To the captain, who headed the boat towards Ireland in the first place, the headland will appear uncommonly like the Old Head of Kinsale.

How is the judge to distinguish between words which lack clarity and some, perhaps temporary, dimness in his own vision? Or should one decently cease to ask questions, acknowledge that clarity like beauty is in the eye of the beholder and rejoice that someone else, in his wisdom, has to discharge the judicial function and declare either in favour of the words or in favour of their meaning in the context?

There are exceptions to the plain words rule. One of these is where the taxpayer is at risk of having imposed upon him a liability so far-fetched and so fantastic that the suggestion cannot be entertained that such a severe result is what Parliament intended. Lord Cairns had said that if the taxpayer was within the letter of the law, tax must be enacted however ruffling to judicial equanimity the process might be. Happily in *Commissioners of Inland Revenue v. Luke*<sup>17</sup> the judges would have none of it. The relevant section imposed liability in respect of any expense incurred by a company in or in connection with the provision, for any director, of living or other accommodation or of other benefits or facilities of whatsoever nature. In *Luke's* case the director occupied as tenant and paid rent for a house owned by the company. During the tenancy the company effected substantial repairs. The expenditure involved not only repairs to walls, chimneys, roof and fences, but also the supply of a new hothouse boiler and of a fireplace and the laying of a new water main, coupled with the renewing of plumbing in the mansion house and the chauffeur's cottage. To the Lord President in the Court of Session it appeared clear that the expenses in question fell within the ambit of the statutory words. The House of Lords found an escape route. "If it is right," said Lord Reid, "that, in order to avoid imputing to Parliament an intention to produce an unreasonable result, we are entitled and indeed bound to discard the ordinary meaning of any provision and adopt some other possible meaning which will avoid that result, then what I am looking for in examining the obscure provision at the end of [the relevant section] is not its ordinary meaning (if it has one) but some possible meaning which will produce a reasonable result. I think that the

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<sup>17</sup> [1963] A.C. 557, 40 Tax Cas. 630.

interpretation which I have given is a possible interpretation and does produce a reasonable result, and therefore I adopt it." Lord Pearce, without comment and without shame, also searched for and found the same reasonable result: "Prima facie, one would expect the intention [of two of the relevant subsections] to be that where the body corporate retains the ownership of the asset—in this case the house or the 'living accommodation'—the expenses that go to acquiring or producing the 'living accommodation' shall not be charged against the director as a benefit in kind, but the annual value of it, enhanced, of course, as it will be by any renewals or repairs, shall be charged against him. That would be a fair and sensible intention." And Lord Pearce went on to show how just such an intention could be extracted from the words used.

A blunt way of describing what the judges did in *Luke's* case is to say that they legislated; they legislated for the particular circumstances of the case before them. They presumed that Parliament intended a reasonable result. They looked at the relevant section of the code—the cluster of sections dealing with benefits in kind—and considered the scheme. They sought to give a meaning to the code which would be logical, harmonious and fair. In the process they said that the words used did not carry their plain meaning but conveyed a modified meaning to be understood from the context. They asked what Parliament meant, not what Parliament had said. Interpretation or legislation? Does it matter? Will any refrain from applauding the result?

If there is to be justice for the individual taxpayer, have we, the individual taxpayers who pick up the bill when tax is avoided, any claim when the boot is on the other foot?

The second example I would cite of adherence to the plain words rule being set aside is the recent *Vestey* decision.<sup>18</sup> Two interpretations of the relevant section were possible. The one, arrived at by looking at the preamble to the section and reading the section as a whole, would confine the application of the section. The section, said Lord Wilberforce, on that basis would be "directed against persons who transfer assets abroad; who by means of such transfers avoid tax, and who yet manage when resident in the U.K. to obtain or to be in a position to obtain benefits from those assets." The alternative interpretation was to give the whole section an extended meaning, so as to embrace all persons, born or unborn, who in any way may benefit from assets transferred abroad by others. Two

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<sup>18</sup> *Vestey v. I.R.C.* (Nos. 1 and 2) [1980] S.T.C. 10.

circumstances add piquancy to the unanimous selection by the House of Lords of the narrower interpretation, that the taxpayer to be taxed is the person who deliberately puts his assets outside the tax net. The first consideration is that the House of Lords had to reverse their own earlier decision in the *Congreve* case,<sup>19</sup> a case which had in the meantime received the express approval of the 1955 Royal Commission. The second is that it is well known, (though, of course, not a matter of which the House of Lords could take note or to which they would have attached any particular significance if they could), that when the relevant section was introduced in Parliament in 1936 any intention to visit on the children the sins of the fathers was expressly disclaimed.<sup>20</sup> In that discussion, too, it must be observed, at least one voice was raised in favour of just such a result since on any other basis, it was suggested, the section would have but transitory effect.

The *Vestey* case shows that even where the legislation is aimed at dispositions which have tax avoidance as their sole or principal objective, even where the House of Lords has declared in favour of a wide interpretation, if an alternative view is possible, reason and fairness can ultimately prevail in at least the favour of an individual taxpayer.

There is by way of postscript, one other moral to be drawn from the *Vestey* story, a tale with a happy ending indeed so long as no unhappy legislative sequel arrives to disturb the equable sense of euphoria currently prevailing. When the 1955 Royal Commission expressed concern about the obscure wording of much anti-avoidance legislation,<sup>21</sup> it referred in terms to the section which was in point in the *Vestey* and *Congreve* cases. The prophetic comment is made in the Report: "We doubt if many lawyers could expound with confidence the effect of the 26 sections that make up Part XVIII of the Act ('Special provisions for taxation of settlors, etc. in respect of settled or transferred income')." And part of the relevant section is then quoted. The remedy suggested was expressed in these terms: "We think that, now that the main lines of this legislation are to be regarded as fully developed and the administration of them has had time to settle down, the opportunity should be taken in the course of the next few years to conduct an expert review of the enactments as a whole. The only kind of body that

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<sup>19</sup> [1948] 1 All E.R. 948, 30 Tax Cas. 163.

<sup>20</sup> *Hansard* 1936 Vol. 313 Col. 688.

<sup>21</sup> Cmd. 9474, para. 1029.

could supply the combination of skill and experience required for the work would be one which contained representatives of the Parliamentary Draftsman's office, of the Board, and lawyers and accountants who are familiar with this specialised branch of work. The purpose of the review would be (a) to enquire to what extent, if any, the relevant legislation may have been shown, in the light of experience, to have been drawn too widely for its purpose, (b) to recommend any modifications of the legislation that will make it shorter, briefer, and more precise." Perhaps, the House of Lords in *Vestey* has covered (a). It would be encouraging to have reason to suppose that (b) has not been overlooked.

Just how difficult it is to distinguish between words that are clear and words that are not too clear, between deciding what statutory words mean and whether they apply to particular circumstances, between legislating, (an "offside" activity) and interpreting, (an "O.K." thing to do), is illustrated by yet another recent House of Lords decision, *Commissioners of Inland Revenue v. Plummer*.<sup>22</sup> The case concerned a straightforward tax avoidance scheme. "Straightforward" in the sense that it lacked the usual complexity, subtlety and window-dressing associated with such schemes. A charity purchased an annuity from an individual. If the bargain whereby the individual made annual payments to the charity was a "settlement," the scheme failed. The bargain did not look very like a settlement but the statute gave to the term an extended meaning: "any disposition, trust, covenant, agreement or arrangement." Just how far did the extension go? "This raises a question of some difficulty and general importance," said Lord Wilberforce, "Are the words of the definition to be given the full unrestricted meaning which apparently they have, or is some limitation to be read into them, and if so what limitation? If given the full unrestricted meaning, the section would clearly cover the present agreement, and would also cover a large number of ordinary commercial transactions.

My Lords, it seems to me to be clear that it is not possible to read into the definition an exception in favour of commercial transactions whether with or without the epithet 'ordinary' or 'bona fide.' To do so would be legislation not interpretation: if Parliament had intended such an exception it could and must have expressed it. But it still becomes necessary to enquire what is the scope of the words 'settlement' and 'settlor' and of the words which are included in 'settlement' in the context in which they appear. If

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<sup>22</sup> *I.R.C. v. Plummer* [1979] S.T.C. 793.

it appears, on the one hand, that a completely literal reading of the relevant words would so widely extend the reach of the section that no agreement of whatever character fell outside it, but that, on the other hand, a legislative purpose can be discerned, of a more limited character, which Parliament can reasonably be supposed to have intended, and that the words used fairly admit of such a meaning as to give effect to that purpose, it would be legitimate, indeed necessary, for the Courts to adopt such a meaning."

The majority found a legislative purpose: "bounty" was the key. No bounty, no settlement. There was no bounty in the tax avoidance scheme. It was a bargain for hard cash. There was no "settlement."

It is instructive to observe how the minority, Lords Dilhorne and Diplock, arrived at the opposite conclusion. Thus Lord Dilhorne: "It cannot, in my opinion, be right for the Courts to amend the definition by adding words to it limiting its scope. That would be legislating. On the other hand, it is open to the Courts when considering particular transactions and whether they come within the definition, to conclude that Parliament cannot have intended that they should be treated as doing so; and to decide, if that conclusion is reached, that they do not. There must be a number of cases in which it cannot have been the intention of Parliament that income transferred to another pursuant to an agreement or arrangement should nevertheless continue to be treated as the income of the transferor." In the view of the noble Viscount the present case was not within that number. And Lord Diplock: "It is common ground between my noble and learned friends that upon a literal interpretation of what, according to [the definition section], is to be understood as included in the expression 'settlement,' the transaction would fall within it. It is likewise common ground that Parliament must have intended some narrower construction than this to be placed on the word 'settlement' in the context of [the charging section]: for, unless it is, it is difficult to think of any transaction in consequence of which income is paid by one person to another that would not fall within the section. The competing views are, on the one hand, that the context in which the word 'settlement' appears in [the relevant part] of the Act shows a parliamentary intention to exclude from its meaning bona fide business transactions only, and, on the other hand, that it shows an intention to include only transactions in which there is an element of bounty." His Lordship then considered whether there were indications in the relevant sections that one or other of these limitations of the statutory words was appropriate. He concluded that there were not and continued:

“So it seems to me that in order to reach a conclusion whether in addition to those transactions which are expressly excluded from [the charging section] any other kinds of transaction whereby income is paid by one person to another were intended to be excluded from its operation, it is necessary to apply to this Part of the Act a purposive construction and to ask oneself the question in relation to the particular kind of transaction which is under consideration ‘Can Parliament really have intended to tax this particular kind of transaction by the wide words that the draftsman has used?’ ” If the only sensible answer to that question is “No” the words of the Act should be understood as inapplicable to that transaction. “That question when asked about a transaction which not only falls within the literal meaning of the words used in the section but has no other object than to enable the settlor to avoid a liability to surtax on his income which he would otherwise be obliged to pay, so far from inviting the answer ‘No,’ invites the answer: ‘Whatever kind of transaction Parliament may have intended to exclude it cannot have been this one.’ ”

In the *Plummer* case then the majority in the House of Lords legislated for the particular application of the section, or if that is an unfair use of words, construed the section by drawing the dividing line in one place, the minority by drawing the dividing line in another. Had the Royal Commission’s suggestion about this part of the statutory code been followed up, some other body might have been called on to draw the line. It has to be drawn somewhere and by someone. Both majority and minority considered it appropriate to look for legislative intent and to look beyond the plain meaning of the words used. Does it come to this? If the words raise a doubt because what they say is ambiguous, or because what they say shocks the courts’ sense of what is fair and proper, regard to the intentment of the statute is permissible.

The minority in the *Plummer* case considered that Parliament could not have intended not to include a tax avoidance device within the scope of a tax avoidance section. This echoes a proposition which has recently emerged to the effect that when anti-avoidance provisions in taxing acts are in point, adherence to the plain words used may have to be abandoned as a guide to construction in favour of a broader approach. What policy was Parliament pursuing? What sort of transactions were intended to be netted? In short, let the mischief aimed at be identified and start from the hypothesis that Parliament’s aim was more likely to be true than wide of the mark.

There is an echo, too, of this same proposition in what Lord Justice Buckley said in the *Garvin* and *Rose* cases already mentioned<sup>23</sup>: "A statutory provision aimed at restricting tax avoidance is not to be construed in the way which is traditionally adopted in construing charging provisions in taxing statutes." In support he cited Lord Wilberforce in *CIR v. Joiner*<sup>24</sup> who in turn commented on what Lord Reid had said in *Greenberg v. CIR*.<sup>25</sup> "For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections [being the same sections which Lord Justice Buckley had to apply], introducing as they did a wide and general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop."

Lord Justice Buckley, as I understand what he said, concluded that this meant that in dealing with an anti-avoidance section he should adopt the approach which he subsequently adopted in *Berry v. Warnett*.<sup>26</sup> (The latter case did not involve an anti-avoidance section. It did involve an avoidance device). What he said was: "This, as I understand it, does not mean that a court should officiously strive to construe a section in its widest possible significance in order to give it the widest possible operation, but that one must look for the meaning evidently intended by the language used bearing in mind the object of the section, and apply that section accordingly without giving either the taxpayer or the Revenue the benefit of any doubt or ambiguity."

Equal opportunities—at least—for goose and gander. Well, it represents an advance on the Blackstone tradition.

In 1932 the Committee on Ministers' Powers considered, amongst other things, the relationship between Parliament and judges in relation to what may be called social legislation. On the question of how the judges go about discovering the intentions of Parliament the Committee's Report<sup>27</sup> cites Lord Blackburn's judgement in *River Wear Commissioners v. Adamson*,<sup>28</sup> a decision which has been

<sup>23</sup> See above n. 15.

<sup>24</sup> *C.I.R. v. Joiner* [1975] 1 W.L.R. 1701, 50 Tax Cas. 449.

<sup>25</sup> [1972] A.C. 109, 47 Tax Cas. 240.

<sup>26</sup> See above n. 16.

<sup>27</sup> Cmd. 4060 at p. 57.

<sup>28</sup> [1877] 2 A.C. 743 at pp. 763-765.

the subject of interesting and critical comment by Lord Devlin.<sup>29</sup> "In all cases" said Lord Blackburn "the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what the intention is without inquiring further, and seeing what the circumstances were with reference to which these words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they are used."

In another judgement, also cited in the Committee's Report<sup>30</sup> Lord Blackburn made the point which has, perhaps, been illustrated by the cases which I have cited, that obscurity, and absurdity too, may sometimes rest in the eye of the beholder: "The great difficulty in all cases is in applying these rules to the particular case: for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will—[The case concerned a will, but taxing act or testament, there may be a morbid similarity]—or produces an absurdity or inconvenience so great, as to justify the court in putting on them another signification, which to that mind seems a not improper signification of the words: whilst to another mind the effect produced may appear not so inconsistent absurd or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction."

In the same Report of the Committee on Ministers' Powers there is an interesting dissenting note from Professor Harold Laski.<sup>31</sup> He was critical of the canons of the traditional method of construction as applied to acts designed to serve a social purpose. He identified four ways in which he reckoned the canons of construction to be defective:

- "(1) They exaggerate the degree to which the intention of Parliament may be discovered from the words of a statute.
- (2) They underestimate the degree to which the personality of the Judge, what Mr. Justice Holmes has called his 'inarticulate major premiss', plays a part in determining the intention he attributes to Parliament;
- (3) They exaggerate both the certainty and the universality of the Common Law as a body of principles applicable, in the absence of statute, to all possible cases;

<sup>29</sup> Lord Devlin, *The Judge as Lawmaker*, see n. 3 Chap. 1 above, at p. 15.

<sup>30</sup> *Allgood v. Blake* L.R. 8 Ex. at p. 163.

<sup>31</sup> Cmd. 4060 at p. 135.

- (4) They minimise the possibility that the judge can, in his work of interpretation, fully operate the principle of *Hayden's case*<sup>32</sup> and consider the evil the statute was intended to remedy so that their construction may suppress the mischief and advance the remedy."

It would seem to me that Harold Laski's comments are not without relevance to the principle of adhering to the plain words which governs, or may still govern, the interpretation of taxing acts. The words used in the act are not, by themselves, much guide to Parliament's intention. It seems somehow stultifying to deny reference to the tax code as a whole when seeking to discover what the words used mean. There appears to be a refreshing judicial readiness, at least in the offing if not yet imminent, to find reasons for looking beyond the words to the context. Of course, the "inarticulate major premiss" of the judge has played its part. It was, no doubt, historically inevitable and politically desirable that it should. One aspect of the discussion of future fiscal policy and its declaration in manifesto form which seems to me sometimes to be overlooked is that the widow who hears or reads references to wealth, supposes her mite to be comprehended by the term since that is the only wealth she knows. She is naturally apprehensive. So earlier generations were naturally apprehensive about property. It was reassuring that the judges showed a sturdy bias towards property and a refined hostility towards taxation. But times change and so do judges. There is still cricket and the sanctity of the Club to protect. In an interesting and amusing article on "The First Hundred Years of Tax Cases"<sup>33</sup> Basil Sabine tells us that one of the Law Lords who decided *Seymour's case*<sup>34</sup> (the retiring Kent cricketer's case) had played for the Authentics and two were members of the M.C.C. In *Brown v. Bullock*<sup>35</sup> (the case about the bank manager's club subscription) Lord Justice Harman confessed that he found some of the arguments extremely distasteful. (It is only fair to the memory of a great judge, who commanded both the respect and the affection of so many of those who appeared before him, to record that when invited by Counsel responsible for the arguments to give further and better particulars of their shortcomings, the Learned Lord Justice could not have been more gracious, more understanding or more forgiving). Judges are no less

<sup>32</sup> (1584) 3 Co. Rep. 8.

<sup>33</sup> [1976] B.T.R. 239.

<sup>34</sup> [1927] A.C. 554, 11 Tax Cas. 625.

<sup>35</sup> [1961] 1 W.L.R. 1095, 40 Tax Cas. 1.

human today than they always were, but in tax disputes they can no longer be relied upon invariably to vote for property.

As to the Common Law, Judges, alas, get little assistance from that source when lacunae appear in the sophisticated web of Parliament's tax codes. But the robust common sense associated with many a common lawyer is not unwelcome in a tax context.

And so to the last point. An approach to tax statutes which recognised that Parliament normally intends to impose a tax universally rather than to leave yawning gaps, that an anti-avoidance provision is usually intended to be effective rather than subtle and that the tax code as a whole can be shown—sometimes not without difficulty, it is true—to be reasonably coherent and rational would be welcome. As the cases which I have cited perhaps demonstrate, it is not entirely certain or uncertain whether such an approach has, or has not, already been adopted.

## CHAPTER FOUR

### THE LAW OF TAX AND THE COMMON PEOPLE

I recall a small girl, whose attendance had been subject to some uncertainty, arriving for a children's party half an hour or so before the time so painstakingly recorded on the invitation. "I was able to come after all" she trilled happily. "Surely, dear, you mean 'before all,' " replied her hostess's granny, always a stickler for precision. So, too, the common people: after all, in point of presentation, before all in importance. They tolerate tax. Most habitually pay, because they have to. It was ever thus.

The 1870 Report of the Commissioners of Inland Revenue, that mine of golden information and invaluable wisdom, puts the position quite clearly. Between the introduction of the income tax and 1806 the exemption limit was reduced from £60 to £50. An ungenerous alteration, you might think. But take note of the reason: "The following extract from the guide book, published by the tax office at that period, will explain the grounds for the alteration. It states 'that the regulation in the former Act by which exemption was granted on the whole of every person's income under £60 a year, which was intended to have a strict and limited operation, has been introductive of the greatest frauds upon the public. It is notorious that persons living in easy circumstances, nay, even in apparent affluence, have returned their income under £60, although their annual expenditure has been treble that sum, and to whom there was no ground for imputing extravagance. The income of whole parishes has been swept away by this fraud, such persons generally bringing their income below £60. Hence it is that the legislature found the necessity of confining the exemptions to £50, that their former returns may be made use of.'"

Ingenious, you must concede. And why not? No wonder that the tale of the destruction of the earlier records<sup>1</sup> became part of taxation mythology at an early stage.

But that was by no means all. At a later stage in their report the Commissioners returned to the topic of tax evasion. "We have frequently called your Lordships' attention to the large evasions which are practised under Schedule D by fraudulent returns. Every year, indeed, flagrant instances come to our knowledge . . . It was

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<sup>1</sup> See n. 29, Chap. 1 above [1967] B.T.R. 271.

not, however, until recently that we were enabled to form a reliable estimate of the loss which the revenue sustains in this way. An extensive demolition of houses by the Metropolitan Board of Works gave rise to a great number of claims to compensation. Two hundred of these were examined by our officers, and in 80 cases surcharges were made and sustained on appeal—that is to say in 40 per cent. of the cases inquired into the Revenue had been defrauded of its dues . . . Of course, if this were a solitary instance of the kind it would be eminently illogical to build any argument upon it, but your Lordships are aware that, as an invariable consequence of claims for compensation, when the actual profits of trades or professions are divulged, we find the income tax returns largely deficient. And, moreover, this is not confined to any particular class, trade or profession: we find the same practice prevailing among legal practitioners, when on the abolition of their exclusive privileges in some particular court they have to make good their claims to your Lordships; we find it on all occasions of large demolition of shops and warehouses for public purposes, in every variety of trade, and we find it in great public companies and in firms whose business is almost a national concern, from its magnitude and world-wide reputation; we, therefore, think that we may venture to generalise upon the facts which the most recent occasion of compensation cases has furnished.

Those facts are that 40 per cent. of the persons assessed had understated their incomes to such an extent that a true return would give us an addition of 130 per cent.

We are far from saying that in all the cases in which income tax returns are deficient there has been a wilful attempt to defraud the Revenue. In many instances no doubt the errors which are committed are unintentional, but what we are chiefly concerned with, is the effect on the public income, which is the same, whatever may be the cause of the deficiency; and the real significance of the subtraction of such a large sum as we have supposed or of anything approaching that sum, is best brought home to us when we remember that 'the exemption of one man means the extra taxation of another,' and that if Schedule D gave its due quota to the Revenue we might be relieved of many an unpleasant impost.

It must also be borne in mind that on lands and houses, on dividends, and on salaries and pensions of public officers, the tax is levied nearly to the uttermost farthing which is due."

Once again the Commissioners' Report is almost contemporary in its content and comment, and precisely pertinent to our present

condition. Why will men and women who would scorn to lift their neighbour's wages from behind the mantelpiece clock habitually raid the community's resources by cheating in relation to tax? Does the system, in particular in its legal aspects, contribute to its own disregard? What, again so far as concerns legal aspects and legal procedures, are the remedies, if any?

Evasion and avoidance are two words which frequently get confused. Evasion is normally reserved for cheating, the dishonest and fraudulent avoidance of tax. Avoidance is a more subtle concept, difficult to define. The confusion may reflect a positive attitude of mind as much as any ambiguity of thought. The 1955 Royal Commission put it this way<sup>2</sup>: "By tax avoidance is understood some act by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. Thus the situation which he brings about is one in which he is legally in the right, except so far as some special rule may be introduced that puts him in the wrong." The Royal Commission went on to analyse two distinct situations: the first, where income exists and the rules are concerned that a particular person shall be assessed upon it as being its real owner. As examples of this category the Royal Commission identified the "settlement" provisions, the close company code and the sections aimed at transfers of assets abroad. In all these cases specific situations have been countered by specific provisions. Broadly the principle is that the income of B and C, trustees, or of B Limited, a close company, or of B and C or of C Limited if located outside the United Kingdom, will be treated as A's income from whom the income originally derived unless A's alienation of the income has been genuine, effective and intended to be permanent. The Royal Commission examined and passed the relevant part of our tax code as working well enough but made the recommendation, already noted<sup>3</sup> and as yet not implemented, that a review of the statutory provisions could usefully be undertaken with the object of stating the law possibly more compactly, certainly with greater clarity.

The second situation—not identified by the Royal Commission as avoidance in terms but, today, falling clearly within that category—is where but for the special statutory provision, assuming the hole to have been discovered and the plug designed, there would have been no taxable income at all. The Royal Commission found this area

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<sup>2</sup> Cmd. 9474, para. 1016.

<sup>3</sup> See above Chap. 3.

baffling,<sup>4</sup> "We have found it impossible to formulate any general principle by which to test the propriety of a special legislative intervention of this kind which has the effect of adding to the category of assessable income a limited class of payments to a limited class of persons without appearing to enlarge the general conception of assessable income." The example mentioned in the Report is the provision which makes a payment for a restrictive covenant subject to tax at higher rates in certain circumstances.

Ingenuity has not stood still since 1955. To the receiving by a taxpayer of sums which would not be income but for legislative intervention has been added the paying of sums which but for such intervention would create a loss or deduction calculated to reduce or eliminate the taxpayer's liability to tax on all or part of his income. A highly sophisticated and specialised market has developed for schemes or arrangements designed either artificially to convert what would otherwise be taxable into an untaxable receipt or to reduce income which would otherwise be taxable by the artificial creation of a loss or deduction.

The causes of this development are not far to seek. They would appear to be similar to the causes of the widespread adoption of evasion. The odious imposition becomes intolerable as rates increase. Truly, or in imagination and fancy, the load is so grievous that the adopting of almost any means to escape it becomes acceptable. Habits are infectious. Observation, frequently misinformed, often exaggerated, suggests that others who ought to know better indulge. But perhaps they do know better. In any event imagined indulgence breeds indulgence. If he, why not I? Soon it becomes a conscientious duty in the interests of business, firm or family to adopt every available legal means to ensure that resources are not depleted by the payment of unnecessary tax.

The dilemma is real, and difficult. The dividing line between fraudulent evasion and ingenious avoidance narrow. After all a small cheat—e.g. the occasional private phone call charged to the office account—will be classified in most moral scales as not far in the scale from a well-planned but technically legitimate raid on the Revenue's resources. The historical background to income tax suggests why tax law was regarded as different from other areas of law and why compliance with tax law was put in a special category.<sup>5</sup> The record suggests that cheating at tax is and always has been widespread.

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<sup>4</sup> Cmd. 9474, para. 1029.

<sup>5</sup> See above Chap. 1.

Within limits it has been made socially acceptable. Consider this extract from W. S. Gilbert's *Ruddigore*. Gilbert was a member of the Bar, an upright and honourable man. Of course, his dialogue is a witty tease. But as always his wit is revealing. Sir Ruthven Murgatroyd, Bad Baronet of Ruddigore, is cross-examined by his ghostly ancestors. Has he discharged his obligation under the Witch's curse to commit a crime a day?

"Rob. Really I don't know what you'd have. I've only been a bad baronet a week, and I've committed a crime punctually every day.

Sir Rod. Let us inquire into this. Monday?

Rob. Monday was a Bank Holiday.

Sir Rod. True. Tuesday?

Rob. On Tuesday I made a false income tax return.

All. Ha! Ha!

1st Ghost. That's nothing.

2nd Ghost. Nothing at all.

3rd Ghost. Everybody does that.

4th Ghost. It's expected of you."

If social attitudes to evasion are tolerant, judicial attitudes to avoidance are ambiguous. Inevitably one judge will emphasise the citizen's right to arrange his affairs within permitted legal limits to avoid the incidence of tax.<sup>6</sup> Another will be critical of the expenditure of so much ingenuity and expertise in a pursuit so devoid of public benefit.<sup>7</sup> Yet a third will find the artificial pretences involved in many schemes worthy of censure.<sup>8</sup> Inevitably metaphors are introduced into the discussion of policy and of individual cases: "There is a certain fascination in being one of the referees of a match between a well-advised taxpayer and the equally well-advised Commissioners of Inland Revenue, conducted under the rules which govern tax avoidance. These rules are complex, the moves are sophisticated and the stakes are high."<sup>9</sup> There can be few other branches of the law where the interaction of interests between community and individual is regarded as no more than a game.

Need we despair? Are the twin problems of evasion and avoidance wholly intractable? John Stuart Mill comes near to saying so<sup>10</sup>: He

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<sup>6</sup> e.g. Lord Tomlin in *Duke of Westminster v. CIR* [1936] A.C. 119, Tax Cas. 490.

<sup>7</sup> e.g. Lord Simon in *Latilla v. CIR* [1943] A.C. 377, 25 Tax Cas. 107.

<sup>8</sup> e.g. Templeman L. J. in *IRC v. Garvin* [1980] S.T.C. 295 and *W. T. Ramsay Ltd. v. IRC* [1979] S.T.C. 582.

<sup>9</sup> Per Donaldson L. J. in *IRC v. Garvin* [1980] S.T.C. 296 at 313.

<sup>10</sup> John Stuart Mill, *Principles of Political Economy*, Book V Chap. III.

first identifies the conditions necessary for making an Income Tax consistent with justice. That incomes below a certain amount should be altogether untaxed. That incomes above the limit should be taxed only in proportion to the surplus by which they exceed the limit. That life incomes or incomes from business should be less heavily taxed than inheritable incomes. We seem to emerge reasonably well from his tests with a possible question mark over higher rate tax. Mill continues: "An income tax, fairly assessed on these principles, would be, in point of justice the least exceptionable of all taxes. The objection to it, in the present low state of public morality, is the impossibility of ascertaining the real incomes of the contributors. The supposed hardship of compelling people to disclose the amount of their incomes ought not, in my opinion, to count for much. One of the social evils of this country is the practice, amounting to a custom, of maintaining, or attempting to maintain, the appearance to the world of a larger income than is possessed; and it would be far better for the interests of those who yield to this weakness, if the extent of their means were universally and exactly known, and the temptation removed to expending more than they can afford, or stinting real wants in order to make a false show externally . . . Notwithstanding, too, what is called the inquisitorial nature of the tax, no amount of inquisitorial power which would be tolerated by a people the most disposed to submit to it, could enable the revenue officers to assess the tax from actual knowledge of the circumstances of contributors. Rents, salaries, annuities, and all fixed incomes, can be exactly ascertained. But the variable gains of professions, and still more the profits of business, which the person interested cannot always himself exactly ascertain, can still less be estimated with any approach to fairness by a tax collector. The main reliance must be placed, and always has been placed, on the returns made by the person himself. No production of accounts is of much avail, except against the more flagrant cases of falsehood; and even against these the check is very imperfect, for if fraud is intended, false accounts can generally be framed which it will baffle any means of inquiry possessed by the revenue officers to detect: the easy resource of omitting entries on the credit side being often sufficient without the aid of fictitious debts or disbursements. The tax, therefore, on whatever principles of equality it may be imposed, is in practice unequal in one of the worst ways, falling heaviest on the most conscientious. The unscrupulous succeed in evading a great proportion of what they should pay; even persons of integrity in their ordinary transactions are tempted to palter with their consciences, at

least to the extent of deciding in their own favour all points on which the smallest doubt or discussion could arise; while the strictly veracious may be made to pay more than the state intended, by the powers of arbitrary assessment necessarily intrusted to the Commissioners as the last defence against the taxpayer's powers of concealment." [At the time J. S. Mill was writing the Additional Commissioners were normally responsible for Schedule D assessments.]

It seems to me that Mill is unduly pessimistic. Large areas of the system operate seemingly satisfactorily and without undue evasion. The system of deduction at source appears to have worked well enough in nineteenth century circumstances. More recently it has shown signs of strain as applied, for example, to subcontractors. Possibly the legal concept of what constitutes an employment needs to be reviewed. Possibly the extensive operation of deduction at source could discourage and inhibit evasion if some modified rate of deduction, less than the basic rate, were available. PAYE has perhaps failed to match up to the complexities of "perks" and benefits in kind. This is an area which might usefully be investigated by such a committee as has been suggested could assist Parliament in keeping the statutory code under review.<sup>11</sup>

As to Mill's comments on the disclosure of incomes, it may be that we are not ready to accept being stripped of all our pretences. Our affectionate regard for appearances may not be wholly contemptible or absurd. But perhaps more could be done in the way of recognising that the details of A's affairs, as disclosed to the inspector, may properly be relevant in ascertaining B's liability. Within the limits of relevance there would seem to be no good reason why the position of one taxpayer should not be considered when testing the position of another. Moreover, if it is appropriate that there should be two quite separate departments and codes of law governing the collection of income tax and VAT, it would at least be reassuring to know that the information collected in relation to the one tax is, and can properly be, made available to check calculations pertaining to the other. It is not doubted that all these matters receive constant and earnest attention from the authorities. The appointment of Lord Keith's Committee<sup>12</sup> is a welcome indication that action is to follow attention.

Mill's comments preceded by many years the arrival of the

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<sup>11</sup> See above Chap. 2.

<sup>12</sup> See above Chap. 2.

accountant on the tax scene. The earliest reference to accountants in the tax code appears to have been the 1903 provision<sup>13</sup> to the effect that if General Commissioners refused to permit a barrister or solicitor to plead before them or to hear any accountant, the appellant could take his appeal to the Special Commissioners who would be bound to hear the barrister, solicitor or accountant. It would appear to be the case that since their arrival accountants have had and continue to have a profound and important effect on standards of reporting for tax. Of course, no production of accounts will prevail against all classes of falsehood. Fingers will continue to be dipped in the till unobserved, undetected and unreported. Cash receipts will continue to by-pass record books. It may be that the original principle, accept the assessment or tell all, needs to be looked at again in relation to standards of book-keeping, accounting and reporting. Why should simple, minimal standards appropriate to different classes of small business not be identified? At the level of the larger company where high standards of auditing prevail and the disciplines imposed by the Companies Act are operative, the impression is that, always excepting deliberate, intricate frauds, evasion is held well within manageable bounds.

There is an aspect of the supply of professional services which is common to accountants and lawyers alike; how are the common people to be protected from professional incompetence? It is a matter of concern to professional bodies in relation to open proceedings. At the level at which practitioners and tribunal at first instance in tax matters meet, the General or Special Commissioner level, there is no publicity and no pecuniary penalty may be awarded to remind those concerned of the need to maintain basic standards of competence, punctuality and reliability. There are areas of the United Kingdom where the unqualified, or less than adequately qualified, practitioner appears to play a not unimportant role in the process of quantifying and fixing liability for tax. It sometimes occurs to me to wonder whether the professional bodies are aware of what is done, or more often not done, under the guise of supplying professional services.

It does seem possible that in this, as in other respects, the whole question of publicity would merit reconsideration in the context of evasion and avoidance. I have suggested why so much importance seems to have been attached to privacy in tax matters.<sup>14</sup> John Stuart

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<sup>13</sup> s. 13 of The Revenue Act 1903 (3 Edw. VII, c. 46).

<sup>14</sup> See above Chap. 1.

Mill at least doubted the need for it.<sup>15</sup> Others have raised the same issue.

In their 1870 Report the Commissioners of Inland Revenue commented: "There is indeed a provision in the Income Tax Act which authorises the District Commissioners to impose treble duty when a surcharge is confirmed on appeal, but there is an almost invincible repugnance on the part of the Commissioners to exercise this power . . . It would greatly strengthen our hands if proceedings in such cases could be taken in the local tribunals, either at Sessions of the Justices or in the County Court, instead of the Court of Exchequer, where the process is dilatory and expensive; and, unless the defendant resists, which is never the case, conducted throughout without any publicity."

The specific comment is now, of course, out of date. All has changed. Criminal prosecutions for tax frauds take place before the ordinary courts in the ordinary way and receive the ordinary degree of publicity attendant upon such proceedings. What might repay consideration is whether "back duty" cases, that is cases where fraud, wilful default or neglect to a culpable degree, is alleged against a taxpayer and proceedings take place before general or special commissioners, to recover tax which would otherwise be out of time for assessment, should not be capable of being heard in open court rather than inevitably behind closed doors. Similarly proceedings for penalties, whether for failing to make returns or for failure as an employer to operate the PAYE regulations might be better, and more effective, if open.

It is intriguing to note that the 1905 Departmental Committee presided over by Mr. Ritchie<sup>16</sup> recommended that the Revenue should have power to publish names and particulars in cases of gross fraud.

When it comes to cases involving tax avoidance, it is at least open to argument that nothing would do more to inject realism into the topic than to bring such cases into the open not merely when they come before the court, as now, by way of case stated, but at the earlier stage when evidence is given by those who have participated in the artificial transactions commonly involved, and by those who have devised and sold the schemes affected. The 1955 Royal Commission seemed to suggest that the problem of distinguishing

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<sup>15</sup> See n. 10 above.

<sup>16</sup> Royal Commission on the Income Tax 1920. App. No. 1 being a Brief History of the Income Tax, prepared by the Board of Inland Revenue.

sheep and goats in the tax avoidance field defeats analysis. It may be difficult to identify comprehensively and with precision the factors which characterise such schemes for the schemes are many and varied. The categories of fiscal ingenuity are not closed. A common starting point is to find a statutory relief or other provision in the tax code normally invoked to obtain a reduction in a taxpayer's liability in the context of some commercial transaction. A transaction bearing a marked resemblance to such a commercial transaction is then engineered and the relief or deduction is claimed. In February and March 1962 the case of *J. P. Harrison (Watford) Limited v. Griffiths*<sup>17</sup> came before the House of Lords. The taxpayer company purchased shares pregnant with dividend. It extracted or "stripped" the dividend. It sold the shares at a loss. It claimed relief for this "trading" loss against the tax notionally deducted from the dividend. If the purchase of the shares, the stripping of the dividend and the sale of the shares constituted either a transaction carried out in the course of a share dealing trade or of itself was an adventure in the nature of trade, the claim for loss relief must succeed. It was the task of the Special Commissioners before whom the appeal came to decide the facts. They did. They found that the taxpayer company's transaction in the shares (the purchase and sale and the intermediate stripping of the dividend) was not entered into as part of any trade of dealing in shares and was not an adventure in the nature of trade. A straightforward question to be decided on the facts you might suppose. A minority of the judges (Lord Reid and Lord Denning in the House of Lords, Lord Justice Donovan in the Court of Appeal) before whom the subsequent three appeals came took that view; but a majority, including the critical majority of three to two in the House of Lords, took the view that the true and only reasonable conclusion contradicted the determination of the Special Commissioners. There was a purchase, there was a sale. The shares were purchased to be sold. That was a trade. That was that.

Nine years later the case of *Lupton v. F.A. & A.B. Limited*<sup>18</sup> came to the House of Lords. In the intervening years Parliament had been busy blocking loopholes as new and ever more dazzling tricks were displayed on the high wire of dividend stripping.<sup>19</sup> The

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<sup>17</sup> [1963] A.C. 1, 40 Tax Cas. 281.

<sup>18</sup> [1972] A.C. 634, 47 Tax Cas. 580.

<sup>19</sup> s. 65 and Sched. 17 FA 1965; Sched. 14, para. 10 and Sched. 19, para. 21 FA 1969.

statutory provisions, however, made no difference to the *FA & AB* case. On somewhat similar facts to the *Harrison* case the House of Lords decided the case the other way. Two of the five Law Lords distinguished the facts from the facts in the earlier case; two thought the earlier decision wrong; one reassessed the earlier decision. All five considered the relevant transaction not to be share-dealing within the trade of dealing in shares. Lord Donovan described the transaction as the planning and execution of a raid on the Treasury using the technicalities of revenue law and company law as the necessary weapons. The Special Commissioners were, of course, wrong once again. They had followed in the second case the decision of the House of Lords in the first case.

What happened in the dividend-stripping saga illustrates a number of points. First, and by the way, it reduces some lingering illusions that the distinction is dominant between a case which raises a question of fact and a case which raises a question of law. Those interested in pursuing that topic are referred to Chapter 2 of an interesting and commendably brief book by Dr. Farnsworth, *Income Tax Case Law*.<sup>20</sup> Dr. Farnsworth reviewed the authorities as they stood in 1946 and showed how they treated a question of degree as a question of fact, such questions being left under the tax code to the appeal commissioners to decide. Since then the case of *Edwards v. Bairstow*<sup>21</sup> has been decided. One practical result of that decision seems to be that if a judge on appeal takes the view that appeal commissioners got it wrong, he will say so without further ado and will reverse their decision. On the other hand if he agrees with the appeal commissioners, he may well say that their decision is one of fact and that he has no power to reverse it, even if he would. In truth, the statutory requirement that an appeal is confined to questions of law has never, I would suggest, been of great significance and is of minimal significance today. The judge or judges who have to decide an appeal also have to decide whether the issue raised is an issue of fact or of law. If they think the reasoning of the commissioners to be wrong or their conclusion absurd, they say so. That is the function of an appellate court. Those who have to decide appeals at a lower level will have their own views. That is inevitable. They may even be persuaded on occasions that they were wrong. It can happen. That is salutary but unimportant. Someone has to give

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<sup>20</sup> A. Farnsworth Ph.D., LL.M. *Income Tax Case Law, Judicial Interpretations of the Income Tax Acts* (Stevens & Sons Ltd. 1947).

<sup>21</sup> [1956] A.C. 14, 36 Tax Cas. 207.

the final decision. That decision may be the decision of three as against two. At least for the time being it is the law. That is what matters.

The second point illustrated is that a decision of the House of Lords can be even more effective in countering avoidance than a statutory provision. It is more subtle and more flexible, more readily adapted to a wide variety of circumstances than any specific statutory provision. If circumstances will not oblige by throwing up appropriate cases at an appropriate time—and currently there would seem to be no shortage of cases coming to the House of Lords from which principles may yet be derived as to how avoidance cases should be approached—there may still be something to be gleaned from the cases to guide the draftsman of anti-avoidance legislation.

The third point illustrated is that the House of Lords has given limited guidance on how sheep and goats are to be distinguished. At least, if the tax outcome turns on whether a transaction is trading according to the true intent and meaning of the Act, it is clear that regard is to be had to the whole context in which the transaction occurs and that a valid distinction may be drawn between a tax-recovery device and trading. My reason for suggesting that the evidence in a tax avoidance case might with advantage be heard in open court is because it seems to me that the touchstone is whether all concerned with such a transaction have confidence in speaking of it openly as the commercial transaction which it purported to be, not necessarily a trading transaction but a real loan or sale or whatever may be involved. It is not, as I see it, the distinction between honesty and dishonesty which is in point in such cases, but the distinction between self-deception and recognising one's own preferences for what they are. The distinction may be subtle; some may doubt its validity. But if capable of being detected, an open forum would seem the best place in which to conduct the forensic test.

The secrecy which surrounds proceedings before General or Special Commissioners is, I have suggested, the product of the commissioners' history. Secrecy is not the only product of that history. In the case of the Special Commissioners, in particular, their strange, unresolved status is another.

Consider the evidence. Peel took credit for introducing the Special Commissioners. As the Commissioners of Inland Revenue put it in their 1870 Report<sup>22</sup>: "The Special Commissioners were introduced for the first time by the Act of 1842, section 23,

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<sup>22</sup> See n. 27 Chap. 1 above.

providing that the Commissioners of Stamps and Taxes [later the Commissioners of Inland Revenue] for the time being shall be Special Commissioners of the Income Tax, together with such other persons as the Lords of the Treasury may think fit to appoint. The number of Special Commissioners in addition to the members of the Board is at present three. [In 1870]. They have the power of making assessment under Schedule D in any case when the taxpayer may elect to be assessed by them instead of the District Commissioners. [Peel's great innovation which never really caught on] . . . On the introduction of the income tax in Ireland, where there are no local commissioners of taxes, the Special Commissioners were invested with the same powers and duties as the General Commissioners in England. [The Special Commissioners still go regularly to Northern Ireland to discharge the same duties as are discharged by the General Commissioners in England. They thus have a unique experience, coy and shy it may be, of the problems confronting General and Special Commissioners and of the differences]. The Special Commissioners are also charged with the duty of making all the assessments on railway companies; on the officers of railway companies in respect of their salaries; on dividends payable in this country out of foreign and colonial revenues, or on the stocks, funds or shares of foreign and colonial companies. [Happily the Special Commissioners have today lost these along with their other administrative functions]."

In fact both Peel and the Commissioners of Inland Revenue seem to have got it wrong. The Special Commissioners had arrived before 1842. Section XXX of the Income Tax Act 1805<sup>23</sup> was in these terms: "That the Commissioners for the Affairs of Taxes for the Time being, together with such other Persons to be appointed as hereinafter mentioned, shall be Commissioners for the Special Purposes of this Act. And it shall be lawful for His Majesty, His Heirs of Successors, under the Royal Sign Manual, or the Lord High Treasurer or the Commissioners of His Majesty's Treasury, or any Three or more of them, for the Time being, by Warrant under his or their Hand and Seal or Hands and Seals, from Time to Time, to appoint such and so many other persons not exceeding Three, to be Assistant Commissioners for such special Purposes, as he or they respectively shall think expedient; which said Commissioners for the Affairs of Taxes and Assistant Commissioners, or any Two or more of them, shall have full Authority to execute the several Powers

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<sup>23</sup> 45 Geo. III, c. 49.

given by this Act to Commissioners for Special Purposes . . . [Here were set out the special purposes, in particular granting charity exemptions] . . . and also shall have full Authority to do any other Act, Matter, or Thing hereby directed or required to be done by Commissioners for Special Purposes, to be appointed under this Act . . . and the said Assistant Commissioners not exceeding Three as aforesaid, shall and may be allowed such Salary for their Pains and Trouble . . . as the said Lords Commissioners . . . shall direct to be paid to them."

The significance of all this is not whether Peel, the Commissioners and even Dowell<sup>24</sup> got their history wrong, but to emphasise that the Special Commissioners started life as three administrative officials at the end of a long government corridor. Their functions were originally administrative; they have lost those. The Commissioners of Inland Revenue were their colleagues; they have lost them. From the start they acted as Two or more; they have lost that requirement only in very limited circumstances. They are paid for their Pains and Troubles as other officers of the Revenue are paid; they have not lost those nor, happily, their pay. But the common people are perhaps to be excused for not knowing who the Special Commissioners are. Undoubtedly, for many people they still reside at the end of a long government corridor. Letters are addressed to the Press referring to the Revenue's own Special Commissioners. Even Members of Parliament have been known to identify the Special Commissioners as the Revenue's. The correspondents of top people's newspapers call them the Special Commissioners of Inland Revenue. They are, of course, unknown by name. They are faceless and anonymous; they work in secret. Even the profession from which most of them are drawn is happy, in effect, to disown them.

Some of these circumstances have not gone unnoticed. On October 9, 1919 A. M. Bremner gave evidence to Lord Colwyn's Royal Commission. The Chariman asked him: "This paper that you have prepared is on behalf of the General Council of the Bar?" The witness's answer is revealing: "It is. I should like to explain that although I have prepared this statement of my evidence at the request of the Bar Council, it has not been submitted to the Bar Council. I understand that it was not the desire of the Bar Council or their intention that my evidence should be submitted to them for

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<sup>24</sup> See n. 23 above. See "The Income Tax Commissioners," Dr. A. Farnsworth, L.Q.R. July 1948.

their consideration. As I understand, they are quite prepared to adopt and accept my views as being representative of those of the Bar." To those familiar with the ways of the Bar there is nothing particularly out of the way in this statement. The Bar is a small profession. Trust is the basis of the relationship between barristers. A single member of the tax bar, in those days small indeed, was quite capable of representing the Bar's views. But the approach shows the Bar—and the Bar would be from where the judges would be drawn—distancing itself from those involved with tax.

Later in the evidence of A. M. Bremner this passage occurs: ". . . there is extraordinary confusion and want of knowledge as to who the Special Commissioners are, and what they are. People say to me 'Who are the Special Commissioners; who appoints them? Are they not a Branch of Somerset House? What communications pass between them and the Inland Revenue?' People do really misunderstand entirely who the Special Commissioners are, and I cannot help thinking that it would be very advantageous if people were made to understand what their position is." Sixty years have gone by but the Special Commissioners remain unidentified and unrecognised.

Evidence had also been given to the Royal Commission on September 25, 1919 by Mr. G. F. Howe, the Presiding Special Commissioner in 1919. Mr. Howe had then served for 44 years in the Revenue having at one stage in his career been a Surveyor. (The Presiding Special Commissioner is a customary rather than a statutory animal. He derives such authority as he possesses from the goodwill of his colleagues rather than from any official source.) In the course of his evidence Mr. Howe was asked questions by a solicitor member of the Royal Commission. "Q. You are paid salary out of an annual vote of Parliament? A. Yes, the Inland Revenue vote. Q. Your tenure, like that of any other civil servant, is at the pleasure of the Crown? A. Yes. Q. Although your status is, therefore, fully that of a professional civil servant, you perform judicial functions? A. Yes. Q. Are you aware of any precedent for judicial functions of the importance of those discharged by your body being discharged by civil servants appointed and paid and pensioned in that manner with that tenure? A. No, so far as I know there is nothing else like it at all." Nothing like it. Mr. Howe in his evidence went on to emphasise that in his long experience no occasion had occurred when anything in the nature of pressure had been brought to bear with a view to influencing his decision in favour of the Revenue. Subsequent generations of Special Commissioners would

unquestionably confirm his testimony. But absence of pressure and ambiguity of position, perhaps, involve different issues.

The 1919 Royal Commission made three significant suggestions regarding the Special Commissioners<sup>25</sup>:

1. "It appears to us desirable to divest the Special Commissioners of the bulk of their administrative work and to restrict their activities merely to the judicial side, that is to say, to make them an appellate tribunal and little else."

Thirty-five years later the 1955 Royal Commission<sup>26</sup> repeated the suggestion. Action was taken in 1964. This is not an area in which change takes place without deliberation. No wonder that between the two Commissions a Presiding Special Commissioner described himself as "the friendless hybrid under the shadow of Somerset House" regarded "not as a judge with a jurisdiction which is as wide as the Kingdom but as a semi-Revenue clerk."

2. "We recommend . . . that in view of the proposed restriction of their duties, and in order to conform to the change already suggested in the name of the Local Appeal Tribunal [*i.e.* the General Commissioners], the Special Commissioners should in future be called Special Appeal Commissioners."

A rose by any other name . . . but the confusion might be less. The 1955 Royal Commission made no reference to the name, but did suggest that the Commissioners of Inland Revenue might cease to be Special Commissioners. From 1964 they did.

3. "We recommend that decisions of the Special Commissioners on appeal on points of principle should be published (at their discretion and without breach of secrecy) and so made available for the information of taxpayers."

The 1955 Royal Commission also considered this point.<sup>27</sup> They rejected it referring to "an immoderate appetite for precedent."

A proposal that selected decisions of the Special Commissioners should be published was included as Clause 46 in the 1977 Finance Bill. After a brief debate the clause was withdrawn. The basis of the withdrawal seems to have been that a wider review of the Special Commissioners' position, on lines suggested by the Council on Tribunals, would take place. Since that date it has been proposed that a merger should take place of the Special Commissioners and

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<sup>25</sup> Cmd. 615, 1920, para. 362.

<sup>26</sup> Cmd. 9474, 1955, para. 951.

<sup>27</sup> *Loc. cit.* para. 973.

the VAT Tribunals. In conformity with the welcome practice of extending consultation a consultative document has been issued and views have been invited. It may be that the Special Commissioners will emerge as part of an independent tribunal comparable in standing and authority to the Lands Tribunal. Should this occur it may well be that the question of reporting selected decisions of the tribunal will be reconsidered. It is easy to overlook the effect on the members of the tribunal of conducting their proceedings behind closed doors and of not being heard outside save only when their decisions are challenged in the courts.

The Committee on Ministers Powers in 1932<sup>28</sup> also noticed the Special Commissioners. Reference was made in the Committee's Report to the 1919 Royal Commission Report which speaks highly "of the public confidence felt in this body of public servants."<sup>29</sup> "This specialised Court is of peculiar interest. By common consent it gives general satisfaction by its impartiality in spite of the fact that its members are not only appointed by the Treasury but may, when not performing judicial duties, actually act as administrative officials. All we can say about it is that it is a standing tribute to the fair-mindedness of the British Civil Service: but the precedent is not one which Parliament should copy in other branches of the administration."

Such expressions of public confidence are gratifying indeed. Some, however, might detect a note of complacency. Others, particularly if they have knowledge of the tribunal over the past 30 years, might less readily endorse the plaudits. Others again might question whether with such a subject matter as the current tax code impartiality, without more, is sufficient.

Does it all matter? Are there all that number of appeals to and from the Special Commissioners? The Reports of Tax Cases indicate the volume of business. When appeal to the High Court by way of case stated was instituted in 1874 the official reports of Tax Cases, described since the publication of volume 43 as "Reported under the Direction of the Board of Inland Revenue in association with the Incorporated Council of Law Reporting" commenced. Four volumes sufficed for the first 25 years, 1875-1900. The next 25 years, 1900 to 1925, were covered in six volumes. Nineteen twenty-five to nineteen fifty occupied 24 volumes, and another 24 covered the years 1950 to 1978. In two fascinating articles, "The First

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<sup>28</sup> Cmd. 4060, 1932, p. 86.

<sup>29</sup> Cmd. 615, para. 359.

Hundred Years of Tax Cases”<sup>30</sup> Victor Grout and Basil Sabine have analysed the contents of tax cases. I commend with gratitude and acclaim the articles to all serious students of the history of tax law. The authors’ research confirms that before 1915 there was no significant number of appeals from the Special Commissioners to the High Court. However, business became brisker after the introduction of surtax. Between 1875 and 1914 29 cases went from Special Commissioners to High Court, between 1915 and 1944 624 cases and between 1945 and 1974, 516. It is clear that after 1914 more cases went to the High Court from the Special Commissioners than from the General Commissioners, an indication, perhaps, that heavier cases tend to go to the Special Commissioners. It is the experience of at least some General Commissioners that cases lasting longer than a day are rare. The Special Commissioners are not unacquainted with cases lasting for several weeks. The statistical evidence suggests that the courts find in favour of the Revenue more frequently than the Commissioners in those cases which go to the courts, that the decisions of the Commissioners when challenged are upheld in something like three out of five cases while a higher proportion of the courts’ decisions are upheld on appeal. Incompetence? Bias? Or are the Special Commissioners unlucky?

Statistics from another fascinating source, “Final Appeal—A Study of the House of Lords in its Judicial Capacity” by Louis Blom-Cooper Q.C. and Gavin Drewry,<sup>31</sup> suggest that an unusually high proportion of tax appeals find their way to the House of Lords, 150 out of 466—or almost one third of the total—civil appeals to the House of Lords between 1952 and 1968 were tax or rating appeals. In 18 cases when the Crown lost Parliament legislated to reverse the decisions; the corresponding figure for cases where the taxpayer lost was nine.

Not many reliable conclusions are to be drawn from statistics such as these. As Messrs. Grout and Sabine point out, with 29 million taxpayers to be catered for, an average of 30 appeals a year to the Courts from Appeal Commissioners suggests that the common people are reasonably content with the manner in which disputes are resolved, whether by agreement or by appealing to General or Special Commissioners. Weighty, and sometimes tedious, though tax cases may be, it still seems open to question whether four tiers of appeals are required when disputes arise. Scotland and Northern

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<sup>30</sup> [1976] B.T.R. 75 and 239.

<sup>31</sup> See Chap. 1 n. 6 above *loc. cit.* at p. 317.

Ireland manage with three. Should the Special Commissioners become a tribunal of standing comparable to the Lands Tribunal, it would seem to merit consideration that appeals should go direct to the Court of Appeal. Whether it would be appropriate to constitute an Exchequer Court of Appeal to be assembled on an ad hoc basis and to be presided over by a Lord Justice with the other members of the Court selected with reference to their background experience is yet another matter which could repay consideration.

In "Final Appeal" referred to above the comment is made: "Revenue law, however, finds the lawyer, on both the common law and the chancery side of the profession, in his element, interpreting and applying statutes, an activity which, after all, is meat and drink to the lawyer. While any good lawyer can cope with the maze of tax legislation, it is fair to point out that there is a specialist Tax Bar." This comment identifies a dilemma in the system as yet unresolved. True it is that any good lawyer can cope with tax law. In Scotland, where there is no specialist tax Bar, they habitually do with great skill and, some might argue, to the advantage of the law's development and the disposal by the courts of tax cases. In recent years senior members of the Bar from the Chancery, and less frequently from the Commercial or Common Law Bars in England, have been making welcome appearances as advocates for the Revenue in tax cases at all levels. The question remains whether the specialist Tax Bar is over specialised. Opportunities for the younger barrister to obtain experience of advocacy in tax cases on the civil side are limited. As is customary where a Government department is concerned, representation of the department tends to be entrusted to the department's own officers (Inspectors of Taxes in the case of the Revenue) or to its legal staff or to barristers identified as more or less retained exclusively by the department. Whether this system is wise or necessary raises quite separate issues: it happens, it works, it is well established and is not noticeably the subject of criticism. As mentioned, among more senior barristers the pattern has been changing and opportunities, similar to those which occur as a matter of course at some other branches of the Bar, to appear now in one interest, now in another, are encountered very much more frequently than once was the case. This must, I would suggest, contribute substantially to the coherent development of the law of tax as interpreted by the courts.

Advocacy, however, is only a part, and a comparatively small part, of the activities of members of the specialist Tax Bar. The other horn of the dilemma is here: could the lawyer on the common

law or chancery side, however "good" as a lawyer, however industrious and energetic, provide the specialised expertise needed to cover the whole field of tax without in the process becoming identified as a specialist? And once so identified, must an element of isolation inevitably intrude? Currently the position may, perhaps, be said to show an advance on the position as it obtained some years ago. Certainly in the fields of education, discussion and the exchange of ideas leading, on occasions, to legislative improvements, gradual changes in the scene have been welcome. The Revenue's changed approach to consultation could lead to further welcome progress. Of course, there are difficulties. The material is sensitive, often politically charged. The interests which must be assuaged, mollified or even occasionally put down are numerous, resistant and often powerful. Inevitably, the wise and experienced will take the view that innovation and enthusiasm are calculated to impede rather than advance what may already be claimed to be an orderly advance towards more open discussion of how tax affects the taxpayer and how the common people's interests can best be served consistently with the inexorable demands of Government and State. But an occasional lapse into boldness and novelty might yet work wonders.

As to the forensic field and the confrontation of the Common People with fiscal authority before tribunals and courts, here too a heartening awareness of the merits of adaptation makes itself felt. Change is, perhaps, still too emotive, too strong a term. None the less it may be hoped that the practices and patterns which prevail in other branches of the law will increasingly be regarded as appropriate to the resolution of fiscal disputes. Perhaps, even the constitutional principle of open justice could be reconsidered without prejudice to proceedings being "closed" whenever cause is shown why privacy should be preserved. Perhaps, too, standards of co-operation between the representatives of opposing parties will continue to rise and to reflect the mutual respect and understanding which the sharing of a common professional background produces in other branches of the law. Perhaps, most important of all, provisions for making and communicating tax laws and for resolving tax disputes will advance with due regard for the need of the common people to understand the meaning, purpose and working of what is provided. Happy indeed the lot of the common people should such need be met.











# CONSTITUTIONAL FUNDAMENTALS

by

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