No. 950—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—22ND MARCH, 1934

COURT OF APPEAL—5TH AND 6TH JULY, 1934

HOUSE OF LORDS—4TH MARCH, 1935

WEIGHT (H.M. INSPECTOR OF TAXES) *v.* SALMON[1]

Income Tax, Schedule E—Emolument of office—Salaried director—Right to take up shares at par value, their market value being considerably higher.

The Respondent was a managing director of a limited company and entitled under a service agreement to a fixed salary. In addition the directors of the company by resolution each year gave the Respondent the privilege of applying for certain unissued shares in the company at their par value, which was considerably less than their current market value; the shares he applied for were duly allotted to and taken up by him, and had, in fact, been retained by him. The earlier resolutions recited that this privilege was granted having regard to the "eminent and special services" the Respondent had rendered to the company, but the resolutions relating to the years covered by the appeal made no reference to his services.

The Respondent was assessed to Income Tax under Schedule E on the basis of the difference between the market value of the shares taken up and the par price actually paid for them. On appeal he contended that he had not received a profit assessable to Income Tax. The Special Commissioners discharged the assessments.

Held, *that the privilege granted to the Respondent represented money's worth and was assessable to Income Tax as a profit of his office as managing director.*

CASE

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, 23, Kingsway, London, W.C.2, on 8th May, 1933, for the purpose of hearing appeals, Harry Salmon, Managing Director of J. Lyons & Co., Ltd., hereinafter

(1) Reported (K.B. & C.A.) 151 L.T. 410; (H.L.) 51 T.L.R. 333.

called " the Respondent ", appealed against the undermentioned assessments made upon him under Schedule E of the Income Tax Act, 1918, *viz.* :

for the year ended 5th April, 1927, in the sum of £7,187 10*s*. 0*d*.
for the year ended 5th April, 1928, in the sum of £7,968 10*s*. 0*d*.
for the year ended 5th April, 1929, in the sum of £7,968 10*s*. 0*d*.
for the year ended 5th April, 1930, in the sum of £9,218 10*s*. 0*d*.
for the year ended 5th April, 1931, in the sum of £10,312 10*s*. 0*d*.
for the year ended 5th April, 1932, in the sum of £9,375 0*s*. 0*d*.
for the year ended 5th April, 1933, in the sum of £8,750 0*s*. 0*d*.

1. The Respondent was a Managing Director of J. Lyons & Co. Ltd., hereinafter called " the Company ", and was employed under a service agreement at a salary of £6,500, free of Income Tax, which was increased as from 31st March, 1929, to £7,280 free of tax. There were other Managing Directors employed under similar agreements, and assessments had been made on those Directors similar to the present assessments, and were also under appeal to us at the same time.

2. The authorised capital of the Company was £9,925,000.

The issued share capital of the Company at March, 1933, was as follows :—

	£
400,000 ordinary shares...	400,000
1,241,273 "A" ordinary shares	1,241,273
647,065 5 per cent. cumulative preference shares	647,065
5,000,000 7 per cent. cumulative preference shares	5,000,000
1,000,000 8 per cent. cumulative preference shares	1,000,000
466,667 6 per cent. preferred ordinary shares	466,667
500,000 proportional profit shares	500,000
450,000 " B " proportional profit shares (10*s*. each)	225,000
Total	£9,480,005

3. A copy of the Memorandum and Articles of Association of the Company is annexed to and forms part of this Case, and is marked "A"(1).

Article 100 provides as follows :—

> " The remuneration of a Managing Director shall from time " to time be fixed by the Directors, and may be by way of " salary, or commission or participation in profits, or by any or " all of these modes."

The Respondent's service agreement was entered into under this Article, and a copy of the existing agreement, together with a copy of the resolution endorsed thereon, is annexed to and forms part of this Case(1).

4. Article 6 of the Company's Articles is in the following terms :—

> " The shares shall be under the control of the Directors, " who may allot or otherwise dispose of the same to such " persons on such terms and conditions, either at a premium " or otherwise, and at such times as the Directors think fit."

5. Resolutions have been passed from time to time by the Directors of the Company giving to the Managing Directors the opportunity of subscribing for the "A" ordinary shares of the Company at par.

The following are extracts from the minutes of the Directors dealing with the matter in years preceding the years to which the appeal relates.

1920, 9th June.

> Resolved that having regard to the eminent and special services involving an abnormal amount of work rendered by Mr. Alfred Salmon, Mr. Isidore Salmon and Mr. Harry Salmon, the three Managing Directors of the Company, during the financial year of the Company which ended on 31st March last, each of them be permitted to make application for and to take up at par one thousand "A" ordinary shares in the capital of the Company.

14th June.

> The Assistant Secretary pro tem produced applications for 1,000 "A" ordinary shares from each of the Managing Directors, Mr. Alfred Salmon, Mr. Isidore Salmon and Mr. Harry Salmon pursuant to the minute of the 9th instant and it was resolved that one thousand "A" ordinary shares in the capital of the Company numbered 84911 to 85910 be and are hereby allotted to Mr. Alfred Salmon. Mr. Alfred Salmon did not vote on this and the two following resolutions.
>
> Similar resolutions for Mr. Isidore Salmon and Mr. Harry Salmon.

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(1) Not included in the present print.

1921, 3rd June.

Messrs. A. Salmon, I. Salmon and H. Salmon having each applied for 1,000 "A" ordinary shares at par it was resolved that having regard to the eminent and special services rendered by them during the financial year of the Company ended March 31st, 1921, the shares be and are hereby allotted to them on the terms of such applications and that certificates be issued accordingly.

1922, 9th June.

The Directors having intimated to the three Managing Directors that the privilege previously accorded them of applying for an allotment of "A" ordinary shares at par would be repeated applications by these gentlemen for 2,000 " A " ordinary shares each at par were produced by the Secretary and it was resolved that having regard to the eminent and special services rendered by them during the financial year ended March 31st, 1922, the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon respectively on the terms of such applications and that certificates be issued accordingly.

1923, 14th June.

The Directors having intimated to the three Managing Directors that the privilege previously accorded them of applying for an allotment of "A" ordinary shares at par would be repeated applications by these gentlemen for 2,000 "A" ordinary shares each at par were produced by the Secretary and it was resolved that having regard to the eminent and special services rendered by them during the financial year ended March 31st, 1923, the shares be and they are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon respectively on the terms of such applications and that certificates be issued accordingly.

1924, 11th June.

The Directors having intimated to the three Managing Directors that the privilege previously accorded to them of applying for an allotment of " A " ordinary shares at par would be repeated applications by these gentlemen for 2,000 "A" ordinary shares each at par were produced by the Secretary and it was resolved that having regard to the services rendered by them during the financial year ending March 31st, 1924, the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon respectively on the terms of such applications and that certificates be issued accordingly.

1925, 28th May.

The Directors having intimated to the three Managing Directors that the privilege would again be accorded to them of applying for 2,000 "A" ordinary shares each at par applications from each of them for that number of shares were produced by the Secretary and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon on the terms of such applications and that the certificates be issued accordingly.

The following are the entries in the minutes relating to the years in question in this appeal containing the resolutions of the Directors and recording the applications of the Respondent for "A" ordinary shares. A copy of his application for shares for the year 1926 is attached to the Case and marked " B "(1); the applications for other years were in similar terms.

1926, 3rd June.

Resolved that the three Managing Directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par. Messrs. I. Salmon and H. Salmon did not vote on this resolution.

1926, 10th June.

The Secretary produced applications from the three Managing Directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 3rd instant and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon on the terms of such applications and that the certificates be issued accordingly.

1927, 26th May.

Resolved that the three Managing Directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par. Messrs. A. Salmon, I. Salmon and H. Salmon did not vote on this resolution.

1927, 9th June.

The Secretary produced applications from the three Managing Directors for 2,500 "A" ordinary shares each at par in accordance with the minute of the 26th ultimo and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon on the terms of such applications and that the certificates be issued accordingly.

1928, 14th June.

The Directors having intimated to the three Managing Directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par applications

(1) Not included in the present print.

from each of them for that number of shares were produced by the Secretary and it was resolved that the shares be and are hereby allotted to Messrs. A. Salmon, I. Salmon and H. Salmon on the terms of such applications and that the certificates be issued accordingly.

1929, 28th May.

Resolved that the three Managing Directors be accorded the privilege of applying for 2,500 "A" ordinary shares each at par.

1929, 12th June.

The Secretary produced applications from the three Managing Directors for 2,500 " A " ordinary shares each at par in accordance with the minute of the 28th ultimo and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon and M. Salmon on the terms of such applications and that certificates be issued accordingly.

1930, 11th June.

The Directors having intimated to the Managing Directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par applications from each of them for that number of shares were produced by the Secretary and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein and J. Salmon on the terms of such applications and that the certificates be issued accordingly.

1931, 2nd June.

Resolved that the five Managing Directors be accorded the privilege of applying for 2,500 " A " ordinary shares each at par.

1931, 11th June.

The Secretary produced applications from the five Managing Directors for 2,500 " A " ordinary shares each at par in accordance with the minute of the 2nd instant and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein and J. Salmon on the terms of such applications and that certificates be issued accordingly.

1932, 31st May.

The Directors having intimated to the Managing Directors that the privilege would again be accorded to them of applying for 2,500 "A" ordinary shares each at par applications from each of them for that number of shares were produced by the Secretary and it was resolved that the shares be and are hereby allotted to Messrs. I. Salmon, H. Salmon, M. Salmon, M. Gluckstein and J. Salmon on the terms of such applications and that the certificates be issued accordingly.

The Managing Directors year by year took advantage of the privilege so accorded to them of applying for shares, and took up and paid for shares accordingly. The assessments appealed against were made upon the basis that the shares so applied for and taken up were worth more than the par price which was actually paid for them.

It is admitted that the market value of the " A " ordinary shares of the Company which had already been issued was much above par at the time the resolution of the Directors according the Respondent the privilege of applying for shares was passed in each of the years in question, and it was admitted that the market value of the new "A" ordinary shares was also much above the par value at that time.

6. Evidence was given to us as to the value of the "A" ordinary shares generally and of particular matters affecting the value of the "A" ordinary shares allotted to the Managing Directors and we are satisfied that the new shares allotted to the Managing Directors year by year were not worth at the time of allotment as much as the market price of previously existing shares. Such new shares did not participate in the yearly dividends payable at or about the time of the allotment, and were not at once quotable on the Stock Exchange. For these and other reasons they were not worth the full market price of quoted "A" ordinary shares on the day of issue. It has not, however, been necessary for us to fix exactly how much less they were worth than the market price, and it is enough to say here that the reduction in value which could be allowed in this respect was not a very large one. Taking the year 1931 as an instance, the value of the shares then allotted was not less than £2 10*s*. a share more than the price paid for them.

7. Evidence was also given to us that the Company had some 33,000 shareholders; that it was not commercially advisable for the Company to make a general issue of "A" ordinary shares at a premium, and that "A" ordinary shares had never been so issued; and that the opportunity of applying for "A" ordinary shares given to the Managing Directors was not transferable by them. It was the policy of the Company to increase the interest of the Managing Directors in the business by encouraging them to acquire and hold as many "A" ordinary shares in the Company as possible. The Respondent had never sold any of his "A" ordinary shares in the Company.

8. On behalf of the Respondent it was contended that the Respondent had not received a profit assessable to Income Tax. The case of *Hilder* v. *Dexter*, [1902] A.C. 474, and a previous decision of the Special Commissioners were referred to.

9. On behalf of the Inspector it was contended that the privilege granted to the Respondent was granted for services rendered or to be

rendered as Managing Director of the Company; that it was of a valuable nature; that its value was assessable to Income Tax; and that the assessments should be confirmed.

10. We, the Commissioners who heard the appeal, felt bound to consider the previous decision of our body to which we had been referred. That case, as also the present one, was very fully argued, and the decision was given in favour of the taxpayer. Although dissatisfaction was expressed with the decision, and a Case was demanded and drafted, the Case was not proceeded with by the Board of Inland Revenue. We were unable to distinguish that case in any substantial point from the present case, and we accordingly held it to be our duty to follow it, and we discharged all the assessments appealed against.

Immediately upon our so determining the appeal, the Inspector of Taxes expressed to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE,
P. WILLIAMSON, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
26th September, 1933.

The case came before Finlay, *J.*, in the King's Bench Division on the 22nd March, 1934, when judgment was given in favour of the Crown, with costs.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., Mr. Wilfrid Greene, K.C., and Mr. Andrewes Uthwatt for Mr. Salmon.

JUDGMENT

Finlay, J.—In this case, I feel that the distinction which was taken by Mr. Latter is altogether too refined and I am unable to agree with the conclusion which was arrived at by the Special Commissioners. I should say that with much more hesitation than I do if the very experienced Special Commissioners, Mr. Braithwaite and Mr. Williamson, who heard the case, had appeared to have applied their minds to it unfettered by authority. I know nothing about it except what appears on the face of the Case, but they appear to have been in a somewhat unfortunate position, because they found that there had been decided by some other Special Commissioners

(Finlay, J.)

a case which they conceived to be in point and to conclude the present case. I have not, of course, had any opportunity of considering the facts or the reasons which may have been assigned in that other case ; I merely mention it for the purpose of pointing out that the view which Mr. Braithwaite and Mr. Williamson took—and very likely correctly took—that it was desirable that they should follow a decision arrived at by some of their colleagues in some other case, prevents me having the benefit of the unfettered opinion upon the present case of those two Special Commissioners that I have referred to who heard this case.

It is not necessary, in order to make my view clear, that I should go in great detail through the facts, or deal at length with the authorities which have been cited. The appeal was by Mr. Harry Salmon, who is a Managing Director of a very well-known company, J. Lyons & Co., Limited. He was employed under a service agreement at a salary and nothing appears to turn upon that. There were other Managing Directors employed under similar agreements and the same point arises with regard to them also.

The point which arises can be shortly put by saying that it is this. Mr. Salmon—I deal with him alone, though what I say with regard to him, as I gather, applies to others also ; it is his appeal only which is before me—Mr. Salmon received a right to apply for shares at par, which were very much more valuable than that, and the effect of what happened was to give to him a valuable thing, to give it to him for a payment indeed, but for a payment which was much below its real value.

The question turns upon Schedule E, the very familiar first Rule of that Schedule, and the question is whether this was a profit—there are various words, but " profit " is enough—salaries, fees, wages, perquisites or profits—and whether it was paid to him as " having " or exercising an office or employment of profit."

It is desirable just to look quite briefly at the history of the matter. The Company has a very large share capital indeed, including a very large number, over a million, of what are called " A " ordinary shares. In 1920 there was a resolution of the Directors : " Resolved that having regard to the eminent and " special services involving an abnormal amount of work rendered " by "—two others and—" Mr. Harry Salmon, the three Managing " Directors of the Company, during the financial year of the Company " which ended on 31st March last, each of them be permitted to " make application for and to take up at par one thousand ' A ' " ordinary shares in the capital of the Company." Thereupon, Mr. Salmon and the other Directors (it is only with Mr. Harry Salmon that I am concerned) exercised that right and, thereupon, the appropriate number of " A " ordinary shares were allotted to him. In 1921 the same thing was done ; in 1922 the same thing was done ; in 1923 the same thing was done ; and in 1924 and 1925 the same

(Finlay, J.)

thing was done ; the only difference appears to be that in 1924 the reference to the services was rather cut down and in 1925 it appears to have been cut out altogether. The first year with which I am concerned here is the year ending on the 5th April, 1927, and, accordingly the resolution which I now have to refer to, of the 3rd June, 1926, comes into the period actually in question. That is a resolution "that the three Managing Directors be accorded the "privilege of applying for 2,500 'A' ordinary shares each at par." That is followed by the application from the three Managing Directors and the necessary formal resolution that those shares be allotted, and, accordingly, to Mr. Harry Salmon those shares were allotted. The same process is gone through in all the years in question. Apparently there was an increase in the number of the Managing Directors and in the later years five Managing Directors were given the privilege and exercised the privilege of taking these shares.

When one looks at the series of resolutions from 1920 onwards I cannot bring myself to doubt that this privilege was granted—I use those words purposely because they bring me to the point which was really made on behalf of the Respondent—that the privilege was granted to a person exercising an office of profit and in respect of his successful exercise of that office of profit. It was a payment made to Mr. Harry Salmon because he was a Managing Director and because in that capacity he had managed the business so successfully and so skilfully.

I am not going to waste time by going through the series of cases in which matters of this sort have been discussed : *Herbert* v. *McQuade*, 4 T.C. 489 ; *Reed* v. *Seymour*, 11 T.C. 625 ; *Mudd* v. *Collins*, 9 T.C. 297 ; and *Hartland* v. *Diggines*, 10 T.C. 247. Those may be regarded as fair examples. When the terms of the earlier resolutions are looked at, it becomes perfectly clear that this was paid to him as the holder of an office and in respect of his successful energy in that office, and it cannot for a moment be suggested that any difference arises by reason of the circumstance that in the later resolutions the reference to the valuable services is omitted. Of course, the thing was done later just for the same reason ; there cannot be any doubt about that.

In order to appreciate, as I hope I have appreciated, the argument which was urged on behalf of the Respondent, it is desirable to look just quite shortly at what the findings of the Commissioners and the contentions before them were. It is found at the end of paragraph 5 that : "The Managing Directors year by year took advantage of "the privilege . . . The assessments appealed against were made "upon the basis that the shares so applied for and taken up were "worth more than the par price which was actually paid for them." Then the Commissioners go on : "It is admitted that the market "value of the 'A' ordinary shares of the Company, which had "already been issued, was much above par at the time the

(Finlay, J.)

" resolution of the Directors according the Respondent the privilege " of applying for shares was passed in each of the years in question, " and it was admitted that the market value of the new ' A ' ordinary " shares was also much above the par value at that time." Then, in paragraph 6, they go on to say that evidence was given before them on this question of value, and they add: " It has not, " however, been necessary for us to fix exactly how much less they " were worth than the market price, and it is enough to say here that " the reduction in value which could be allowed in this respect was not " a very large one. Taking the year 1931 as an instance, the value of " the shares then allotted was not less than £2 10*s.* a share " more than the price paid for them." Then the Commissioners refer to evidence with regard to the number of shareholders, to the fact that it was not commercially advisable for the Company to make a general issue of " A " ordinary shares at a premium and that the opportunity of applying for these " A " ordinary shares was not transferable, of course, for perfectly obvious business reasons. They say: " It was the policy of the Company to increase the interest of " the Managing Directors in the business by encouraging them to " acquire and hold as many ' A ' ordinary shares in the Company " as possible. The Respondent had never sold any of his ' A ' " ordinary shares in the Company."

The contention of the Respondent was that the Respondent had not received a profit assessable to Income Tax and he referred to the case of *Hilder* v. *Dexter*, reported in [1902] A.C. 474, which I am bound to say seems to me—and I have looked at it—to have nothing to do with the present case. The contention of the Inspector was: " That the privilege granted to the Respondent was granted " for services rendered or to be rendered as managing director of the " company; that it was of a valuable nature; that its value was " assessable to Income Tax." The Commissioners refer to the previous decision, about which I know nothing, of course, except for the reference which they make to it, and say that in that case there was a decision adverse to the Crown and the matter was not pursued, and further, as they were not able to distinguish that case from the present, they conceived it to be their duty to follow it and therefore discharged the assessments.

That is the position. What I have said will make it clear that, in my opinion, this falls to be assessed if it was money or money's worth. That well-known phrase has been, I think, repeated, but is taken from the judgment of the Lord Chancellor, Lord Halsbury, in *Tennant* v. *Smith*, 3 T.C. 158(1). The contention of Mr. Latter was this. He based it upon several cases, but it is probably sufficient to refer to the case of *Tennant* v. *Smith*, the well-known case in reference to the residence of a bank manager, quite recently considered and applied by the Court of Appeal in the case of *Robinson* v. *Corry*(2), reported in [1934] 1 K.B. 240. It will probably

(1) 3 T.C., at p. 164. (2) 18 T.C. 411.

(Finlay, J.)

be sufficient to refer to this case. What Mr. Latter said was this. What is given here is a privilege. The privilege is not transferable; therefore, while in a sense it is a thing of value, it is of the same sort of value as the house in the case of *Tennant* v. *Smith* or *Robinson* v. *Corry*; it is not money and it is not a thing which can be turned into money, any more than the bank manager, compelled to live in the house, could turn his occupation of the house into money. That analogy seems to me to fail. I appreciate the principle upon which it is decided that, where you get an advantage which you cannot turn into money, as in the case of *Tennant* v. *Smith* or in the case of *Robinson* v. *Corry*, that is not assessable, but I cannot think that it applies to the present case. Here, in substance, the thing can be turned into money, and it at once occurs to one that there is a broad distinction between this and *Tennant* v. *Smith*. In *Tennant* v. *Smith* the man could not get money. All that can be said here is that there are, so to speak, two stages in the acquisition of the money, but I cannot think that that makes any difference. What is done really is this. The Managing Director is given the privilege of applying for shares worth—I do not know what the figures are, but it is useful to take a figure to illustrate it—he is given the right of applying for a number of shares, each share being worth £4, and is given the privilege of applying for and receiving those shares for £1. When he has received the shares, he has the right of doing whatever he likes with them. I do not fail to notice that, in fact, Mr. Salmon has not disposed of any of his shares, doubtless because he thinks it proper to conform to the policy of the Company that the Managing Director should have a large stake in the Company, and, partly, very likely because he thinks that these shares are highly advantageous things to hold and that it is not desirable to get rid of them. But that does not affect it. When he has got the share, he has got a valuable thing and he has got a thing which, by the simple expedient of selling, can be turned into money. I cannot bring myself to doubt that the privilege which is given, and given, as I have already said, quite clearly in respect of services rendered as Managing Director, is a privilege which is in itself not indeed money but money's worth. It enables him to get for a smaller price shares which are of much greater value than the amount he has to give for them. It enables him in that way to get into his hands things of value which he would not otherwise get. After all, one must have regard, I think, in a case of this sort to the substance of what is done. Numerous passages might be cited to justify that view. One has to look at the substance of the thing, and the substance of the thing is as plain as possible here. The Company thought that these gentlemen were performing very valuable services and that, as the result, no doubt, of their valuable services, the Company was doing extremely well and, therefore, it gave them something of value. It is simply idle to say that what it gives them is not something of value and something of very great value.

(Finlay, J.)

I am not going to review the cases ; I do not think it would really be useful that I should. I have referred to the two main cases upon which Mr. Latter rested his ingenious argument, but it seems to me that it would fly in the face of the plain facts to say here that this gentleman, Mr. Harry Salmon, has not been given money's worth and given it in respect of his very skilful management of his office.

There is not really any more that I need say about the case. That seems to me to represent the substance of it and I, accordingly, must differ from the view which, following another decision, the Special Commissioners, Mr. Braithwaite and Mr. Williamson, took. The result, therefore, is that the appeal of the Crown in this case must be allowed.

The appeal will be allowed with costs and the case remitted to the Special Commissioners to adjust the figures.

The Attorney-General.—If your Lordship pleases.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 5th and 6th July, 1934, and on the latter date judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. Wilfrid Greene, K.C., and Mr. Andrewes Uthwatt appeared as Counsel for Mr. Salmon and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Hanworth, M.R.—We need not trouble you, Mr. Attorney. This appeal fails. It is an appeal on a point which always involves the consideration of somewhat nice points, but the facts are that during a number of years—I think the first year to which our attention has been called is the year 1920—it appears that the opportunity has been given by a resolution to the Appellant in this case, Mr. Harry Salmon, to apply for and take up at par a certain number of "A" ordinary shares in the capital of the Company of J. Lyons and Company, Limited, Mr. Harry Salmon being a Managing Director of that Company. This privilege by this resolution was granted in 1920, 1921, 1922, 1923, 1924, 1925 and so on through the years which are the subject of the assessment—that is, 1927 to 1933. The number of shares in respect of which the

(Lord Hanworth, M.R.)

privilege was granted varied, but, broadly speaking, the resolution was one passed each year which gave this privilege to the Directors, and it was given to them expressed originally—but now, perhaps, by habit it has become so well-known that the resolution does not always enshrine it—because of the " eminent and special services " involved as Managing Director.

The assessment has been made upon Mr. Harry Salmon in respect of the profit which he obtained by exercising this privilege. What he did was this: he took up shares in each year, and the shares which he took up were not, at the time they were taken up respectively, of the same value as these "A" shares were quoted at on the Stock Exchange in the ordinary market. They were of slightly less value by reason of the fact that the profits attaching to them had not accrued and would not accrue until a later period than they would accrue to those shares which were the subject of quotation; but broadly speaking, the Commissioners find this: " It " has not, however, been necessary for us to fix exactly how much " less they were worth than the market price, and it is enough to " say here that the reduction in value which could be allowed in this " respect was not a very large one. Taking the year 1931 as an " instance, the value of the shares then allotted was not less than " £2 10*s*. a share more than the price paid for them."

The assessment is based upon the fact that after the exercise of this privilege Mr. Harry Salmon found himself a richer man by the possession of these shares for which he applied and which had been allotted to him—a richer man in this sense, that, if he had been so minded, he would have been able to sell those shares at a larger sum than the price at which he applied for them, and a profit would have accrued to him in consequence of such a sale.

Looked at quite broadly, it would appear that one of the advantages, one of the, I think I may use the word, emoluments, which accrued to this Managing Director was that during these years and over a long period of years—certainly for thirteen years, according to the evidence—he had been granted this privilege, the benefit of which enured to him in his hands, making him year by year a richer man in the sense that he had got into his hands something which, if so minded, he could have turned into a profit.

It is said that what was given to the Director was a personal privilege, one which, unless he had been able to find the money with which to pay for the shares, could not have been exercised at all, and one, therefore, to which there was so much of the personal element, personal ability and personal volition attaching, that it cannot be held to be otherwise than something quite different from a mere profit accruing to him by reason of his holding the office of Managing Director.

(Lord Hanworth, M.R.)

We have had our attention drawn to *Tennant* v. *Smith*(1), a case which is always referred to as indicating that there are some things which may be held by the holder of an office which are not to be accounted for or returned as a liability to Income Tax. That was the case where the appellant held the right to reside in the bank house and was given that by reason of the fact that he was the bank manager. Lord Watson says(2): "His position does not "differ in any respect from that of a caretaker or other servant, the "nature of whose employment requires that he shall live in his "master's dwelling-house or business premises, instead of occupy- "ing a separate residence of his own." Lord Watson propounds the test suitable in that case and says this in [1892] A.C., at page 159(3): "Is it, then, a perquisite or a profit of his office? I do "not think it comes within the category of profits, because that "word, in its ordinary acceptation, appears to me to denote some- "thing acquired which the acquirer becomes possessed of and can "dispose of to his advantage—in other words, money—or that "which can be turned to pecuniary account." Taking those words as they stand, the criticism is directed to this particular privilege as one which cannot be turned to the advantage of the possessor unless he turns himself about and finds the money with which to apply for the shares, secures the shares, and then, when in possession of the shares, desires to turn them into money by a sale of them, and there are passages which confirm that view, that test, if you will, from *Tennant* v. *Smith*.

Lord Halsbury criticises the observations which had been made by the Lord President in the Court below, but the Lord President made one observation in the passage which was read to us which seemed to me of value and which was not in any way objected to in the House of Lords. He said this: "A question like this is difficult "to answer in the abstract." I agree with him. I myself should be very sorry to attempt to lay down a rule, a proposition, or a definition which would apply to all these cases. I think it far safer to bear in mind what has been said in *Tennant* v. *Smith*; equally, one has to bear in mind what has been said in cases like the *Attorney-General* v. *Ashton Gas Company*, [1904] 2 Ch. 621, where Lord Buckley was dealing with the question of what the shareholder does receive when he receives 10 per cent. tax free, and he says this, at page 623: "He receives 10 per cent. and an "indemnity against a liability to pay part of it"—that is, the dividend—"to the Revenue, or allow a deduction by the company "of such part as the company has paid to the Revenue for income "tax. He thus gets more than a 10 per cent. dividend." It cannot be said there, when he has got that dividend free of Income Tax, that he immediately gets something which he can turn into

(1) 3 T.C. 158. (2) *Ibid.*, at pp. 166/7. (3) *Ibid.*, at p. 167.

(Lord Hanworth, M.R.)

money. Rather, he gets a sum from which there is to be no deduction, a sum which is immune from deduction. Take another case. In *Samuel* v. *Commissioners of Inland Revenue*(1), [1918] 2 K.B. 553, at page 559, Mr. Justice Sankey, as he then was, says this: "I will call the amount which is to be distributed to the "shareholders x and the amount which is paid to the Govern- "ment y. Now the profits of the company are not x, the part "divided amongst the shareholders, but x plus y, for the income "tax is part of, and has been taken out of, the profits. Coming "now to a distribution to an individual shareholder, the same "reasoning applies. When a company has paid, say for the sake "of argument, a sum of £100 to a shareholder as dividend free of "tax, it has also paid, assuming the rate of income tax to be "1*s.* 2*d.* in the pound"—a very bold assumption—"a further "sum of £6 3*s.* 10*d.* to the Government. As far as the shareholder "is concerned his share is really £106 3*s.* 10*d.*, and the company "pays £100 to him and £6 3*s.* 10*d.* to the Government . . . . on "his behalf." I have referred to these cases, the *Ashton Gas Company* case and the *Samuel* case merely for showing that it would not be right to concentrate attention upon *Tennant* v. *Smith* alone, however important it is to bear in mind what was said in that case.

I come back, therefore, in the particular case, not in the abstract, to look at the Rule which we have to apply and interpret in reference to the facts of this case. Schedule E requires that tax shall be charged in respect of an office or employment of profit, and the Rule which says how the tax is to be charged is Rule 1, which is as follows: "Tax under this Schedule shall be annually charged "on every person having or exercising an office or employment of "profit mentioned in this Schedule, or to whom any . . . . "stipend, as described in this Schedule, is payable"; and then it goes on: "in respect of all salaries, fees, wages, perquisites or "profits whatsoever therefrom for the year of assessment." Attention has been drawn to the fact that at the moment when this privilege of applying for the shares is given there is no immediate profit. That can only be realised by the application, a response to the application, the possession of the shares and a possibility of selling them. But what we have to consider is "profits whatso- "ever therefrom for the year of assessment." It appears to me that, by any ordinary test, it would be said that a man had been fortunate in holding that office, for he had not only received in the course of the year of assessment the salary paid to him in the form of money, but he had also enjoyed the profit which arose from these constant and successive allotments of shares which enured to his advantage and increased the estate at the end of each year.

(1) 7 T.C. 277, at p. 283.

(Lord Hanworth, M.R.)

I have added those words, such as they are, for the purpose of showing the reason why I have come to the same conclusion as Mr. Justice Finlay and in deference to and in respect for the argument which has been presented to us by Mr. Latter and by Mr. Wilfrid Greene, but, except for those reasons, I should really have been content to accept the judgment of Mr. Justice Finlay and to say that, for the reasons which he gives and, I may add, for the reasons that I have ventured to add of my own, I think the appeal must fail and be dismissed with costs.

Slesser, L.J.—I am of the same opinion. It will be noted that the language of Rule 1 of Schedule E, which imposes the liability to tax in respect of " all salaries, fees, wages, perquisites or profits " whatsoever therefrom ", is very wide, and contemplates not only the receipt of money, but also, to use Lord Watson's language in *Tennant* v. *Smith*(1), " something acquired which the acquirer " becomes possessed of, and can dispose of to his advantage, in " other words money, or that which can be turned to pecuniary " account."

In the present case it is common ground that what this gentleman received was not money but a privilege to obtain certain shares, which shares proved to be valuable beyond the par price at which he was privileged to obtain them. Primarily the question whether the particular advantage is one which could or could not be turned to pecuniary account would be a question of degree and consideration in every particular case. In the present case, unfortunately, we have not the assistance of the Commissioners in deciding whether this particular transaction was one which could properly be said to be turnable to pecuniary account so as to be made liable to taxation, because the Commissioners, in paragraph 10 of the Special Case, merely said that, having heard the appeal, they felt bound to consider a previous decision of their body when a case was fully argued and a decision given in favour of the taxpayer. They say: " We " were unable to distinguish that case in any substantial point from " the present case ", but they have not favoured us with the materials in that case, nor do we know really anything about it, and, therefore, Mr. Justice Finlay had himself to come to a conclusion as to the nature of this transaction, and so have we, without any assistance to be derived from any finding of the Commissioners.

In my view, having regard to the circumstances in the present case, I think it would be idle and to ignore the substance of the matter if one did not say that this privilege here to obtain the very valuable shares in a most prosperous company was not a valuable asset which could be turned to pecuniary account. I agree with Mr. Wilfrid Greene that there may be cases where the privilege is so subjective and so individual that it may not fall properly within

(1) 3 T.C., at p. 167.

(Slesser, L.J.)

that definition. I am content to say that the present is not such a case, as I view it. Looking at the substance of the matter, I cannot conceive that anybody obtaining this privilege to obtain these shares could possibly have the slightest difficulty, however impecunious or embarrassed he was, in finding means to turn such a very valuable asset to pecuniary account, and, therefore, on the facts of this case as I see them, without going into the more subtle questions of what might apply in other cases under different considerations, I think it is clear that this gentleman has, in respect of his office or employment, received a salary, fee, wage, perquisite or profit liable to taxation under Rule 1 of Schedule E.

Romer, L.J.—I agree. The principle to be applied in cases of this kind is stated by Mr. Justice Rowlatt in *McLoughlin's* case, 11 T.C. 83, at page 89, and that statement of his was expressly approved in the same case by Lord Justice Warrington, as he then was, at page 95. The principle so stated by Mr. Justice Rowlatt was this : " If a person is paid a wage with some advantage thrown " in, you cannot add the advantage to the wage for the purpose of " taxation unless that advantage can be turned into money."

It is perfectly plain, on the facts of this case as found by the Commissioners, that in each year when the particular privilege was conferred upon the Appellant, there was conferred upon him a privilege which, if he thought fit, could be made to produce a sum in cash in a very short time, and the sum which could be so produced was a sum which at the time of the conferring of the privilege could have been almost exactly ascertained in pounds, shillings and pence.

For these reasons it appears to me that the decision of Mr. Justice Finlay was right and that this appeal ought to be dismissed.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Atkin, Tomlin, Russell of Killowen, Macmillan and Wright) on the 4th March, 1935, when judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. Wilfrid Greene, K.C., and Mr. W. A. Andrewes Uthwatt appeared as Counsel for Mr. Salmon and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Atkin.—My Lords, this is an appeal from a decision of the Court of Appeal affirming an order of Mr. Justice Finlay reversing the Special Commissioners. It is an appeal by the taxpayer, Mr. Harry Salmon, who is a Managing Director of the well-known Company of J. Lyons & Co., Ltd., who had been assessed to Income Tax under Schedule E of the Income Tax Act, 1918, in respect of allotments of shares that had been made to him in the circumstances which are set out in the Case.

The material section of the Income Tax Act appears in Rule 1 of Schedule E : " Tax under this Schedule shall be annually charged " on every person having or exercising an office or employment of " profit mentioned in this Schedule, ... in respect of all " salaries, fees, wages, perquisites or profits whatsoever therefrom " for the year of assessment."

The assessments were made in respect of the six taxing years from the year ended 5th April, 1927. The position is that Mr. Salmon, the Appellant, had been a Managing Director of the Company for a number of years, and the first of a series of resolutions upon which these shares came into the possession of the Appellant begins by a resolution of the 9th June, 1920 : " Resolved that having regard to the eminent and special services " involving an abnormal amount of work rendered by Mr. Alfred " Salmon, Mr. Isidore Salmon and Mr. Harry Salmon, the three " Managing Directors of the Company, during the financial year of " the Company which ended on 31st March last, each of them be " permitted to make application for and to take up at par one " thousand 'A' ordinary shares in the capital of the Company." Five days afterwards, the Assistant Secretary produced applications for one thousand "A" ordinary shares from each of the Managing Directors, and it was resolved that one thousand shares should be allotted to each of them.

There is a whole series of resolutions which follow right through up to the year 1932, the only difference being that the reference to " eminent and special services " after a time falls to be omitted. No doubt by that time the value of the services was well ingrained in the minds of the Directors of the Company, and the numbers of shares allotted rose gradually. In 1922 the shares allotted were 2,000 shares, which continued until 1926, when the amount of shares rose to 2,500 shares, which is the figure at which it remains up to the present time.

The "A" shares are shares which rank with the ordinary shares of the Company for full dividend, except that apparently they do not give a voting privilege. At all the material times these "A" shares could be sold in the market and were of a value in the market much above the par value at which the Directors acquired them. We have not got the full particulars of the prices, but apparently in some

(Lord Atkin.)

cases the prices were something like £3 or £4 as compared with the par value of £1. The result was that these Managing Directors got a very profitable advantage to themselves; and indeed it is very interesting to-day, when people sometimes say there is no gratitude in commerce, to feel that that is refuted by the circumstances of this case, and it is clear that the Board of the Company have fully recognised the valuable services rendered by these Managing Directors, for in addition to receiving a salary which is now about, I think, £7,000 a year free of Income Tax, they have in these last years also had the advantage of receiving allotments of shares which they have obtained for £2,500 and which they could sell the next day for something like £7,000, £8,000, or even £10,000.

The question that arises is whether or not that advantage given to the Managing Directors comes under the words " salaries, fees, " wages, perquisites or profits whatsoever therefrom ", that is, from " having or exercising an office or employment of profit." That it was in fact remuneration for the office of profit, I think there can be no question at all, upon the facts that I have stated. We have not, perhaps fortunately, to consider the precise meaning now of the word " perquisites ", because " perquisites " received a definition in the Income Tax Act of 1842, it received another statutory definition in the Income Tax Act of 1918, and now that assistance has been withdrawn from the Courts, because the statutory definition has been repealed(1). It is quite sufficient here, I think, to say that this comes within " or profits whatso- " ever "; I can have no doubt that here was a profit that was a profit which was in fact given to the Managing Director and enjoyed by him.

It is to be observed that while the Board have expressed their willingness to entertain an application for these shares, nobody was bound and no right was given and no profit was received of any kind by the Appellant until the application had been accepted and the shares in question had been allotted to him. At that moment he received from the Company 2,500 shares upon which there was no clog whatever and he was entitled to go on the market and sell those shares, for which he had paid £1, and he would at once be in a position to receive £3 or £4 or £5, as the case might be.

I think it is really impossible to appreciate the argument which suggests that that was not an immediate profit in the nature of money's worth received by the Director as remuneration for his services. It appears to me to correspond very closely in substance to a case where a company might have sold 1,000 tons of its product, if the company were a colliery company, to a director who was in the coal trade, at a price which was one-third of the market price of the day. There no question could arise that the person was

(1)Rule 4 of Schedule E was repealed by Finance Act, 1922, Third Schedule.

(Lord Atkin.)

receiving a profit in the nature of money's worth and he was receiving that profit in the nature of money's worth to the extent of the difference between the price he could get for it and the price he had actually paid.

For these reasons—I am not quite sure they are precisely the same reasons as those given by the Court of Appeal—this case appears to me to be a very simple case, and I move your Lordships that this case be dismissed with costs.

Lord Tomlin.—My Lords, I agree and have nothing to add.

Lord Russell of Killowen.—My Lords, I also agree.

Lord Macmillan.—My Lords, I also agree.

Lord Wright.—My Lords, I agree.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed against be affirmed and that this appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Bartlett & Gluckstein.]