

No. 1131—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
5TH AND 6TH APRIL, 1938

COURT OF APPEAL—9TH, 12TH AND 13TH DECEMBER, 1938, AND
23RD JANUARY, 1939

HOUSE OF LORDS—12TH AND 13TH FEBRUARY AND 12TH MARCH,
1940

PRENDERGAST (H.M. INSPECTOR OF TAXES) v. CAMERON⁽¹⁾

Income Tax, Schedule E—Emoluments of office—Payment by company to a director in consideration of his refraining from resigning his office.

The Respondent, who had been for many years a director of a limited company, intimated to his fellow directors his intention of resigning his office. In a letter dated 17th December, 1934, they asked him, in the interests of the company, not to serve notice of resignation and said that the company, in consideration of his acceding to this request, would, within a certain time, pay him a sum of £45,000 and would embody its undertaking to do so in a formal deed. On 31st December, 1934, the company entered into a deed wherein, after a recital of the circumstances and the consideration set out in the letter of 17th December, 1934, the company agreed to pay to the Respondent two sums of £35,000 and £10,000. These sums were duly paid. The Respondent continued in office, devoting less time to the company's business, and receiving a reduced salary.

On appeal by the Respondent against an assessment to Income Tax under Schedule E in respect of the sum received under the deed of 31st December, 1934, the Special Commissioners held that the Respondent received the said sum for the consideration recited in the deed and that it was not subject to Income Tax under Schedule E in his hands.

Held, that the sum received by the Respondent arose from his office as director and was properly assessable to Income Tax under Schedule E.

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

CASE

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

⁽¹⁾ Reported (K.B.) [1938] 2 All E.R. 617; (C.A.) 160 L.T. 210; (H.L.) [1940] A.C. 549.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th November, 1936, John Cameron (hereinafter called "the Respondent") appealed against an assessment to Income Tax in the sum of £45,000 for the year ending 5th April, 1936, made upon him under the provisions of Schedule E of the Income Tax Acts.

1. The Respondent was, at all times material to this appeal, a director of Higgs and Hill, Ltd. (hereinafter referred to as "the Company"). The Company, which is a Private Company, carries on the business of builders and contractors. A copy of its Memorandum and Articles of Association, marked "A", is annexed to and forms part of this Case⁽¹⁾.

2. About the end of 1934 the Respondent intimated to the Company that he desired to exercise his right to resign from the office of director, under the provisions of Article 107(D) of the Company's Articles.

3. The Company carried on a prosperous business for which the Respondent was largely responsible. The Company did not wish to lose the benefit of his valuable services. With this object in view a letter was written to him on behalf of the Company, dated 17th December, 1934, stating that, if he did not serve notice of resigning, the Company would pay him the sum of £45,000. A copy of this letter, marked "B", is annexed to and forms part of this Case⁽¹⁾.

4. A deed, executed 31st December, 1934, made between the Company and the Respondent, embodies the undertaking set out in the said letter and, for the consideration contained therein, the Company agreed to pay to him £35,000 on 31st December, 1934, and £10,000 on 31st March, 1935. A copy of this Deed, marked "C", is annexed to and forms part of this Case⁽¹⁾.

5. The said sums were duly paid by the Company and received by the Respondent on the respective dates. He continued to serve as a director of the Company at a salary of £400 per annum in lieu of his previous salary of £1,500 per annum.

6. Prior to 1933 the remuneration of the directors of the Company was fixed by Articles 96 and 97. On 19th July, 1933, a Special Resolution of the Company was passed, which rescinded the said Articles 96 and 97, and provided for the remuneration of the directors to be determined by the Company in General Meeting.

By a Resolution of the Company dated 11th July, 1923, it was provided, *inter alia*, that the remuneration of the Respondent should be at the rate of £850 per annum calculated as from the 26th December, 1919, and that balances standing to the credit

⁽¹⁾ Not included in the present print.

of the Profit and Loss Account and the Reserve Account, after making provisions for reserve and Income Tax and payment of dividend, should be distributable by way of further remuneration among the directors, the Respondent's share of these balances being 20 per cent. This arrangement was to apply until determined or varied by resolution of the Company. A copy of this Resolution as contained in the Minute Book of the Company, marked " D ", is annexed to and forms part of this Case⁽¹⁾.

7. The said Resolution dated 11th July, 1923, was varied by a Resolution of the Company dated 20th May, 1925, which provided that, from 31st December, 1924, each director should share equally in the sums distributable among them, and that in pursuance of the Resolution dated 11th July, 1923, as now amended, there should be paid to each of the directors, including the Respondent, the sum of £8,000 free of Income Tax but not Super-tax. These sums were to be paid by eight quarterly instalments, the first payment being on the 29th September, 1925. A copy of this Resolution, marked " E ", is annexed to and forms part of this Case⁽¹⁾.

8. By an Agreement between the Company and its directors, including the Respondent, dated 3rd December, 1928, after reciting the said Resolutions dated 11th July, 1923, and 20th May, 1925, it was agreed, *inter alia*, that the directors of the Company would not claim to be entitled to receive, now or in future, any share of the balances standing to the credit of the Profit and Loss Account and the Reserve Account. A copy of this Agreement, marked " F ", is annexed to and forms part of this Case⁽¹⁾.

9. The following is a copy of a Resolution of the directors of the Company passed 23rd June, 1933 :—

“ Mr. J. Cameron having pointed out that under verbal
“ arrangement with the other Directors he was entitled to
“ one-third of the available balance on Profit and Loss Account
“ and Reserve Accounts, this was agreed to in principle and
“ the matter was left over for discussion and for the devising
“ of means by which the arrangement could be carried out ”.

10. The Respondent gave evidence at the hearing which we accepted as follows :—

He had been appointed a director of the Company in 1919 and had served as such ever since. He first joined the Company in 1891 and had in all forty-four years' service with it. He had played an important part in the development of the Company's business. At one time he held 1,300 £10 shares in the Company which he purchased from Mr. R. P. Higgs in 1928. He sold these shares in 1935 to members of the Hill

(1) Not included in the present print.

family. The capital of the Company was £80,000 in £10 shares which had been mainly and were now entirely held by members of the Hill family. The directors had a fixed salary of £1,500 per annum and in addition received, from time to time, sums which had no reference to the Profit and Loss Account or the Reserve Account balances. When he first joined the Company there were five directors, but from 1928 onwards there were three. There existed a gentleman's agreement between the directors as to the said additional sums received, and it was agreed they should all three share equally as regards additional remuneration, although they were not equal shareholders. The Resolution of 23rd June, 1933, was in confirmation of this gentleman's agreement although in view of the said Agreement dated 3rd December, 1928, he was not entitled to any share of the balances on Profit and Loss and Reserve Accounts. He had not received anything under this Resolution. At the end of 1934 he wished to resign, in view of his long service and because he desired a rest. He acquainted the Company with his intention of giving notice under Article 107(D). He did not know how the said sum of £45,000 was arrived at and was not present at any discussions concerning the matter. The sum was offered to him by the two other directors. He agreed to remain on as director at the salary of £400 per annum on the understanding that he would devote less time in the future to the Company's business. The said sum of £45,000 had no reference to any sum or sums in the accounts of the Company, at the time when it was offered to him he was not aware of the amount of the Company's balances or reserves.

11. It was contended on behalf of the Appellant that the said sum of £45,000 was subject to Income Tax under the provisions of Schedule E.

12. This contention was resisted on behalf of the Respondent.

13. We, the Commissioners, gave our decision as follows:—

We hold that the Respondent received the sum of £45,000 for the consideration expressed in the said letter dated 17th December, 1934, and embodied in the said deed made 31st December, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out. We also accept the evidence given by the Respondent and are satisfied that the sum of £45,000 had no relation to any sum or sums contained in the Company's Profit and Loss and Reserve Accounts or to any possible claim he might have in respect thereof. In view of the said agreement, dated 3rd December, 1928, and the Special Resolution passed 19th July, 1933, in our opinion the Respondent was not legally

entitled to any share in the balances or reserves of the Company either under the said Resolutions dated 11th July, 1923, 20th May, 1925, 23rd June, 1933, or as a result of the terms of any gentleman's agreement made between the directors. From 19th July, 1933, the directors' remuneration was solely dependent on a resolution of the Company in General Meeting.

We hold that the sum of £45,000 is not subject to Income Tax under the provisions of Schedule E in the hands of the Respondent. We discharge the assessment.

14. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

R. COKE, }
C. C. GALLAGHER, } Commissioners for the Special
Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

6th April, 1937.

The case came before Lawrence, J., in the King's Bench Division on the 5th and 6th April, 1938, and on the latter date judgment was given in favour of the Crown, with costs.

The Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Raymond Needham, K.C., and Mr. R. A. Willes for the Respondent.

JUDGMENT

Lawrence, J.—I am obliged to Counsel in this case for their able and ingenious arguments. The question is whether the sum of £45,000, which was paid to the Respondent in pursuance of a letter of the 17th December, 1934, in two instalments on the 31st December, 1934, and the 31st March, 1935, is taxable income under Schedule E.

The Respondent had been for many years a director of a company of builders and contractors. Towards the end of the year 1934, he had intimated to his fellow directors his intention of resigning, as he was entitled to do under article 107 of the company's articles of association. The other directors then wrote

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to him a letter of the 17th December, 1934, in which, after having considered his recent intimation that he intended forthwith to determine his directorship, they asked him, in the interests of the company, not to serve such notice; and they said that, in consideration of his acceding to this request, the company would, within a certain time, pay him a sum of £45,000, and would embody its undertaking so to do in a formal deed. Then on the 31st December, 1934, the company entered into the deed, which recited that the company, in the circumstances set out in the letter of the 17th December, 1934, had, for the consideration therein specified, agreed to make to the Respondent the payments thereafter set out, that is to say, £35,000 and £10,000.

The Commissioners have held that the Respondent received the sum of £45,000 for the consideration expressed in the letter of the 17th December, 1934, and embodied in the deed of the 31st December, 1934. They state that they accept the deed as genuine and find that the conditions contained therein had been carried out.

The remuneration of the directors was made at all material times by resolution of the company, and the facts as to remuneration, which are rather obscure, are set out in paragraphs 6 to 9 of the Special Case, but I do not think it is necessary for me to detail them now. The Commissioners also find as a fact that the Respondent agreed to remain on as a director at a salary of £400 per annum, on the understanding that he would devote less time in future to the company's business. The Respondent, up to December, 1934, had been receiving a salary of £1,500 per annum.

The Commissioners, in these circumstances, decided that the £45,000 in the hands of the Respondent was not subject to Income Tax under the provisions of Schedule E.

It is argued on behalf of the Crown that the sum of £45,000 constitutes salary, fees, wages, perquisites or profits from his office as a director; and that the case is distinguishable from the case of *Dewhurst*, 16 T.C. 605.

The Respondent, on the other hand, contends that the case is covered by the case of *Dewhurst*; and that the findings of the Commissioners in this case amount to this: that the consideration for the payment of £45,000 was a momentary or instantaneous promise on the part of the Respondent not to serve a notice of resignation; that the £45,000 was not paid in any sense for his past services, or for any future services; that the possibility of his resigning under article 107 of the articles of association was a contingent liability upon the company; that, that contingent liability having been discharged for the moment of time, the case is strictly

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analogous to the case of *Dewhurst*⁽¹⁾; and that the findings of the Commissioners that the consideration expressed by the letter and deed was the true consideration make it impossible to hold that the consideration for that payment was in any shape or form the performance of future services.

On the other hand it is contended for the Crown that the facts of the *Dewhurst* case are quite different from the facts of this case, because there the director, Commander Dewhurst, was entitled under his original contract of employment or office to receive a large sum of money on resigning. The payment which was made to him of £10,000 was made in discharge of a liability of the company under his original contract. In the present case it is contended that it is impossible to consider the discharge of the suggested contingent liability of the resignation of the Respondent as in any way comparable with or analogous to the discharge of the contingent liability of the company in *Dewhurst's* case from the payment of a large sum of money.

In my opinion it is true that the observations of Lord Atkin in *Dewhurst's* case can be used to support the contention put forward on behalf of the Respondent, as also can the reasoning of Lord Thankerton, notably the speech of Lord Atkin at page 645 and the speech of Lord Thankerton at page 649. But Lord Warrington, who was the other member of the House who formed the majority, decided the case upon its own special facts, which he considered very peculiar⁽²⁾. In these circumstances, having regard to that difference of opinion in the House of Lords, and to the difference in the facts here, it seems to me that I am not bound by that decision to accept the arguments of the Respondent in this case. The Respondent never having ceased to be a director of the company, in my opinion the sums which he received from the company are *prima facie* profits from his office as a director within the meaning of Rule 1 of Schedule E. His acceding to the request made in the letter of 17th December, 1934, involved that he would remain as director of the company for some period; and that undertaking to remain as director of the company for some period was the consideration for the payment of £45,000. I cannot regard it as a discharge of a contingent liability in the sense spoken of by the noble Lords in the *Dewhurst* case. The Respondent acceded to the request not to give notice under article 107 of the articles of association. In *Dewhurst's* case the company was liable to the director for a sum exceeding £10,000. Here the company was not liable to the director for anything, upon the facts found by the Commissioners. Therefore, I think the true consideration for the payment of the £45,000 must have been the desire of the company

(1) 16 T.C. 605.

(2) *Ibid.*, at pp. 643/4.

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that he should continue as a director. If that were the consideration for the payment, then the payment arises from his office as director.

For those reasons, in my judgment, the decision of the House of Lords in the case of *Dewhurst*⁽¹⁾ does not govern this case. I am of opinion that the Commissioners, though they did not refer to *Dewhurst's* case, must have had that case in mind; or, if not, then they have come to an erroneous conclusion in law.

In my opinion, the appeal, therefore, must be allowed with costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Sir Wilfrid Greene, M.R., and Finlay and Luxmoore, L.JJ.) on the 9th, 12th and 13th December, 1938, when judgment was reserved. On the 23rd January, 1939, judgment was given in favour of the Crown (Sir Wilfrid Greene, M.R., dissenting), with costs, confirming the decision of the Court below.

Mr. Raymond Needham, K.C., and Mr. R. A. Willes appeared as Counsel for Mr. Cameron, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Finlay, L.J.—The Master of the Rolls is unfortunately unable to be here owing to a slight indisposition. He has asked me to read his judgment, which is as follows:—

Sir Wilfrid Greene, M.R. (read by Finlay, L.J.).—I regret to find myself in disagreement not only with the views of Lawrence, J., but also with those expressed in the written judgments of my colleagues which I have read. In my opinion the Special Commissioners came to a correct decision.

The facts are stated in the Case and are summarised in the judgment of Lawrence, J., and there is no necessity for me to repeat them at length. But there are certain matters which require to be set out in order to explain the reasons on which this judgment is based.

At some time previously to the 17th December, 1934, the Appellant had intimated to his co-directors on the board of Higgs and Hill, Ltd., that he intended to retire from the board at the end of the year. In order to carry out this intention all that was

⁽¹⁾ 16 T.C. 605.

necessary for him to do was to serve a written notice of resignation under article 107 (D) of the company's articles of association. The service of such a notice would automatically have determined his directorship without the necessity of any acceptance by the company. Thereafter, the Appellant could only have been replaced upon the board by the company in general meeting, as the articles of association contain no power in the directors to fill a casual vacancy. In these circumstances the board of directors of the company were anxious that the Appellant should not serve his notice of resignation.

Pursuant to a resolution of the board passed on the 17th December, 1934, a letter was written to the Appellant on that date in the following terms: "The Board have considered your recent intimation that, in the exercise of your right so to do under Article 107 of the Company's Articles, you intend forthwith to determine your Directorship, and I am authorised to ask you, in the interests of the Company, not to serve such Notice and to say that, in consideration of your acceding to this request, the Company will, within 21 days or by such instalments as you will accept, pay you the sum of £45,000 0s. 0d. and will embody their undertaking so to do in a formal deed reciting this letter". The Appellant did not send in his resignation, and on the 31st December, 1934, a deed was executed to which the company and the Appellant were parties. The material parts of this deed were as follows: "Whereas Mr. Cameron is a Director of the Company And Whereas the Company in the circumstances set out in the letter hereunto annexed has for the consideration therein specified agreed to make to Mr. Cameron the payments hereinafter set out And it is hereby agreed between the parties that the Company shall pay to Mr. Cameron the following sums on the following dates: On the 31st day of December 1934 the sum of £35,000 and on the 31st day of March 1935 the sum of £10,000".

In his evidence, which the Special Commissioners accepted, the Appellant stated that he "agreed to remain on as director at the salary of £400 per annum on the understanding that he would devote less time in the future to the Company's business". This agreement is evidenced by a resolution of the board dated the 31st December, 1934, a copy of which is before us, although it forms no part of the Case. The salary of £400 a year was substantially less than what the Appellant had previously been receiving.

The crucial finding of the Commissioners is as follows: "We hold that the Respondent received the sum of £45,000 for the consideration expressed in the said letter dated 17th December,

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“ 1934, and embodied in the said deed made 31st December, 1934.
“ We accept the deed as genuine and find that the conditions contained therein have been carried out ”.

This finding we are not entitled to question, nor are we entitled to say that in substance it means something different to what it says. It is a finding which determines clearly and precisely the legal relationship between the parties in the circumstances to which it refers, the true nature of the contract under which the £45,000 was paid and the consideration moving from the Appellant in regard to that payment. Now the consideration expressed in the letter was the act of the Appellant in acceding to a request by the company not to serve the notice of resignation which he was intending forthwith to serve—that and nothing more. The contract did not impose upon the Appellant any obligation to act as a director. It is true that so long as he refrained from serving a notice he remained a director, but this was a by-product of his undertaking not to serve the notice, not the performance of that undertaking. The £45,000 was paid to him, not for the by-product, but for the undertaking, and in view of the finding of the Commissioners we are not, in my judgment, entitled to hold the contrary.

The matter may be tested by considering what the legal position would have been if the Appellant immediately after the making of the contract had in breach of it served a notice of resignation. The notice would have been effective under the articles of association to determine his directorship, and the company's cause of action would have been not for damages for breach of a contract to serve as a director (for this was not the contract) but for damages for breach of a contract not to serve a notice of resignation for which the measure of damages would have been different.

This leads me to another matter. The Appellant did agree to continue as a director at a reduced salary of £400 a year, but this was a separate agreement and formed no part of the agreement under which the £45,000 was paid. To hold otherwise would be to contradict the finding of the Special Commissioners as to the true consideration for that payment. There were thus two contracts quite distinct in law, and neither of them formed any part of the consideration for the other. Each of them imposed separate obligations on the Appellant, the acts by which they could be broken by the Appellant would not be the same and the causes of action which would arise by reason of any such breach would be different. The agreement to serve as a director was an agreement to serve upon the terms governing the office laid down in the articles, one of which is that a director may resign by notice in writing. If on the 31st December, 1934, immediately after the deed was executed and the agreement made whereby the Appellant undertook to serve as a director for £400 a year, the Appellant had

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served a notice of resignation, he would not have broken his agreement to serve as a director, because his right to resign was inherent in the office, but he would have broken his agreement not to serve the notice of resignation. Similarly, if he had committed a breach of duty as a director, the company could only have sued him for breach of his agreement to serve as a director which implies faithful service; it could not have sued him for breach of his undertaking not to serve the notice of resignation. Moreover, as from the making of the two agreements he was being remunerated for his services as a director under his agreement to serve as a director. He was not by serving as a director earning the £45,000, since he had already earned it by agreeing not to send in his resignation.

These distinctions may appear fine, but they are, in my opinion, real distinctions in law which must not be disregarded. The application of the Income Tax Acts involves in many cases fine distinctions which operate sometimes in favour of the Crown and sometimes in favour of the subject. It is of the utmost importance, if there is to be any principle in these matters, that these distinctions be not blurred. The precise nature of a contract and of the consideration in law moving from the parties is often the determining factor in the question on which side of the line a particular case falls, and once the true nature of the contract and the true consideration are ascertained, it is not in my opinion, legitimate to treat them as though they were different. If the Commissioners had found as a fact that the agreement contained in or ratified by the deed of the 31st December, 1934, was part of one transaction under which the Appellant agreed to serve the company as a director for an immediate payment of £45,000 and an annual remuneration of £400, the position would have been different. But this is exactly what they have not found, and I am unable to treat the case as though they had. It may be suggested that, upon the view which the Special Commissioners took, the consideration which the company received for the £45,000 was inadequate. But this does not, in my opinion, justify me in treating what in law was unquestionably a real consideration as being something different to that which the Special Commissioners have found that it was. As a matter of business the company may well have been satisfied by the expectation that the Appellant would feel in honour bound not to resign for some time, but no such expectation forms any term of the contract, and we are precluded by the finding of the Special Commissioners from inferring that it did.

With all respect to Lawrence, J., he appears to me to have over-ridden the finding of the Special Commissioners. He says⁽¹⁾: "His acceding to the request made in the letter of 17th December,

(¹) See page 128 *ante*.

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"1934, involved that he would remain as director of the company for some period; and that undertaking to remain as director of the company for some period was the consideration for the payment of £45,000". Again he says⁽¹⁾: "I think the true consideration for the payment of the £45,000 must have been the desire of the company that he should continue as a director. If that were the consideration for the payment, then the payment arises from his office as director". My reasons for disagreeing with the first of these two passages already sufficiently appear. The second passage I construe as meaning that the company paid the Appellant the £45,000 because they desired that he should continue as a director. Such desire could not be and was not the consideration for the payment. It may have been the motive, but that is not, in my opinion, a relevant matter.

The question then arises whether the assessment under Schedule E was properly raised against the Appellant in respect of the £45,000. Was it a profit from his office of director? It is quite true that, if he had never been a director, he would not have received this payment, but that is not enough. The profit, to be assessable under the Schedule, must arise from the office. In my opinion it did not so arise. It was not an emolument "received . . . as a reward for services rendered in the course of the employment", to use Lord Atkin's words in *Hunter v. Dewhurst*, (16 T.C. 605, at page 645), nor was it a reward for services to be rendered. By refusing to perform the duties of a director the Appellant would have committed no breach of the contract under which the £45,000 was paid. The payment was made in consideration of the Appellant refraining from serving the notice which he was intending to serve and which under the terms of his employment he was entitled to serve, not as a reward for services past or future.

A variant of the present case would be one where the holder of a salaried office was bound to serve for a term of, say, six years, subject to a right to resign at the end of, say, the second year. If, after the execution of the agreement and before the end of the second year, the employer chose to make a contract with the holder of the office under which in consideration of a money payment he agreed to give up his right to resign, I cannot see how it could be said that the sum paid was a profit arising from the office. In the converse case, if the right to determine the tenure of the office lay with the employer and not with the holder, and the holder made a subsequent contract under which he paid the employer a sum of money in consideration of the employer giving up his right to determine the tenure of the office, the sum so paid could not properly be described as an expense of the office—it

(1) See page 128 *ante*.

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would be a sum paid in order to enable the holder of the office to retain his office and receive its emoluments, a very different thing.

Reliance was placed by Counsel for the Appellant on *Dewhurst's* case⁽¹⁾ and, although I do not think that the decision in that case covers the present, it does illustrate what I conceive to be the imperative necessity of ascertaining the exact nature of the contract under which the alleged remuneration is received, and of not imputing to it a different character for the purpose of bringing the case to the other side of the line. Commander Dewhurst had for some years been a director of a company and chairman of the board at a substantial remuneration. Under article 109 of the company's articles of association on resigning office as a director he would have become entitled "by way of compensation for the loss of office" to a sum calculated by reference to the director's fees received by him during the preceding five years⁽²⁾. It was held by this Court on appeals by two other directors who had resigned that the sums payable to them under this article were remuneration for services rendered and therefore profits derived from the office which they held. In July, 1923, Commander Dewhurst wrote to the company (1) informing them of his intention to resign the chairmanship; (2) offering to waive any future claim under article 109; (3) asking for payment of £10,000 in cash; (4) offering to remain on the board at a remuneration of £250 a year, a sum substantially less than he had previously been receiving. The board accepted these terms, the sum of £10,000 being referred to in the resolution⁽³⁾ as "compensation for loss of office, in lieu of the provision under" article 109. The £10,000 was duly paid. The Special Commissioners found⁽⁴⁾ that the payment to Commander Dewhurst was made "by way of compromise of existing and future rights, Commander Dewhurst remaining on as a director but upon a reduced scale". Now it is to be observed: (1) that if Commander Dewhurst had retired, he would have been entitled under article 109 to a payment which, it must be taken, would have been remuneration for past services and taxable accordingly; (2) that if he had merely continued to serve as a director at a reduced salary, the sum payable to him under article 109 when later on he retired would have been substantially less than what he would have received if he had retired at the time; (3) that the sum which he received was "by way of compromise of existing and future rights" under article 109. The Court of Appeal held that the fact that the payment was made as a compromise in respect of what he would have received if he had retired forthwith was sufficient to stamp

⁽¹⁾ 16 T.C. 605.⁽²⁾ *Ibid.*, at pp. 606/7.⁽³⁾ *Ibid.*, at p. 617.⁽⁴⁾ *Ibid.*, at p. 622.

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it with the same character as it would have borne if it had been a payment made upon actual retirement. In the House of Lords, Lord Dunedin (who dissented) thought that in its true nature the payment was "just deferred remuneration" (16 T.C., at page 640). Lord Macmillan (who also dissented) thought that Commander Dewhurst "received these payments in consideration" of his agreeing to vary the existing terms on which he held his "office of director and consenting to continue to hold that office" on those altered terms" (16 T.C., at page 652)—an analysis of the position resembling very closely that put forward by the Crown in the present case.

Now all these opinions, if regarded as statements of what the contract might have been without producing any different financial result to that in fact produced, are unchallengeable. But the defect in them, if I may respectfully so call it, is that they all involve departing from the true terms of the contract and the true nature of the consideration moving from Commander Dewhurst. Lord Warrington was of opinion that the £10,000 "was paid" not by way of remuneration for past services or of services thereafter to be performed, but in performance of an arrangement under which Harry Dewhurst was enabled to give only "occasional attendance at the board . . . while at the same time the company did not lose altogether the benefit of his help" (16 T.C., at pages 643/4). As part of that arrangement "he disclaimed all rights for himself and his executors under article 109, the directors, on the other hand, agreeing to pay the sum in question" (at page 643). Lord Atkin said (at page 645), "To induce him not to retire, the company agreed to give him a lump sum of £10,000 in consideration of which he agreed to release them from the obligations under article 109, both in the past and in the future. He entered into no bargain to serve the company for any particular time The £10,000 was not paid for past remuneration, for the condition of its becoming payable, for instance, loss of office, never was performed. It was not paid for future remuneration, for that was expressed to be £250 per annum, which was to be the sole remuneration". Lord Thankerton (at page 649) said that the payment "formed the consideration for the company's release from their contingent obligations under article 109", and he pointed out that the payment "was in no way conditional on such service" (*scilicet* as a director) "and the remuneration for such service was otherwise provided for by the new arrangement". It is clear from these extracts that the majority of the House of Lords were deciding the case by reference to the exact bargain and the true consideration for the payment, and were declining

to substitute a different bargain and a different consideration, a principle which in this judgment I have endeavoured faithfully to follow.

I would allow the appeal, but as my brethren take a different view the appeal will be dismissed with costs.

Finlay, L.J.—This is my own judgment which I am now about to read. The case is a difficult one and near the line, but I have, though with hesitation, come to the conclusion that the judgment of Lawrence, J., is correct. I need not say that the doubt which I felt at the end of the argument has been greatly accentuated by finding that the Master of the Rolls takes a view different from mine. I have had an opportunity of seeing his judgment, and I have anxiously reconsidered the matter. But I have not been able to alter the view which I had formed, and I am therefore bound, though of course with great diffidence, to express that view.

The question is whether the sum of £45,000 is chargeable under Schedule E as coming within the words "salaries, fees, wages, perquisites or profits" within the First Rule applicable to Schedule E. The facts are set forth in the various paragraphs of the Case, and the gist of the matter is really got from the deed of the 31st December, 1934, with the letter attached. The letter is as follows :

" Dear Mr. Cameron,

" The Board have considered your recent intimation that, in the exercise of your right so to do under Article 107 of the Company's Articles, you intend forthwith to determine your Directorship, and I am authorised to ask you, in the interests of the Company, not to serve such Notice and to say that, in consideration of your acceding to this request, the Company will, within 21 days or by such instalments as you will accept, pay you the sum of £45,000 *Os. Od.* and will embody their undertaking so to do in a formal deed reciting this letter.

" Yours truly,

" W. Matthews Hill "

The finding of the Commissioners, by which we are of course bound, was as to the vital matter in the following terms : " We hold that the Respondent received the sum of £45,000 for the consideration expressed in the said letter dated 17th December, 1934, and embodied in the said deed made 31st December, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out "

(Finlay, L.J.)

The position on this finding appears to me to be that the Appellant was a director of the company and (*see* his evidence which was accepted by the Commissioners) at the end of 1934 he wished to resign in view of his long service and because he desired a rest. The sum was offered to him by the other two directors. He agreed to remain on as director at the salary of £400 per annum. It may be said, and I feel the force of this, that the £45,000 was not a remuneration of his office, but was a sum paid to him as consideration for forbearing to send in his resignation. It has seemed to me that this is too narrow a construction. The Appellant was a director of the company. His fellow directors highly valued his services, and were willing to pay him a large sum to retain them. There is a passage in the judgment of Romer, L.J., (as he then was) in *Henry v. Foster*, 16 T.C. 605, at page 633, which I think is relevant here: "Now, supposing that a director " is employed upon the terms that he is to be paid in each year of " his service a sum of £1,000, and in the last year of his service " a sum of £5,000 in addition to the £1,000, no one I think " could doubt in such a case that the £5,000 was a profit of his " office, paid to him in respect of his office, that it was liable " to Income Tax, and was to be treated for the purposes of tax " as forming part of his salary for the last year of his office".

In my opinion this sum of £45,000 was paid to the Appellant by way of special remuneration for performing the duties of a director. He was a director when the payment was arranged for, he was a director when the payment was received, and he continued in accordance with the bargain to perform his duties. I cannot resist the view that in these circumstances the sum paid to him was paid to him in respect of his continued services as a director.

Some difficulty arises in reference to the case of *Hunter v. Dewhurst*, 16 T.C. 605. That case disclosed an unusual difference of judicial opinion. Upon one side were Rowlatt, J., and three members of the House of Lords. On the other side were the three members of the Court of Appeal and two members of the House of Lords. Nor is it altogether easy to get at the *ratio decidendi* of the majority of the House of Lords. It is clear that Lord Warrington decided upon a very narrow and special ground (*see* page 644). The gist of the decision of Lord Atkin and I think of Lord Thankerton also was that the true view there was that it was a sum of money paid to obtain a release from a contingent liability under the contract of employment (*see* page 645). If this is correct, it seems to me that *Dewhurst's* case does not govern the present case.

It was also argued that this was a payment, not of income, but of capital. No doubt plausibility is given to this argument by the very large sum involved, but, if indeed the sum was paid

as remuneration for services performed as director, then I cannot think that the argument that this sum is a capital sum can prevail. If, in the illustration referred to above in the judgment of Romer, L.J., (as he then was) in *Foster's* case⁽¹⁾, £40,000 was substituted for £5,000, I cannot think that this would affect the matter.

For these reasons I arrive at the conclusion that the judgment of Lawrence, J., was correct, and I do not think that my reasons differ substantially from those which influenced him.

Luxmoore, L.J.—The question to be determined on this appeal is whether Mr. John Cameron is liable to be assessed to Income Tax under the provisions of Schedule E of the Income Tax Acts in respect of a total sum of £45,000 paid to him during the year ending the 5th April, 1935.

The answer to the question depends upon whether the sum falls within the scope of Rule 1 of Schedule E to the Income Tax Acts, which so far as material provides that: "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 therefrom for the year of assessment". The directorship of a limited company is one of the offices mentioned in the Schedule.

Mr. Cameron was assessed to Income Tax in respect of the sum of £45,000 for the year ending the 5th April, 1936. He appealed to the Special Commissioners in respect of this assessment and obtained its discharge. A Case was stated for the opinion of the King's Bench Division of the High Court, which came before Lawrence, J. He held that Mr. Cameron was liable to Income Tax on the £45,000. Mr. Cameron appealed from that decision.

The material facts are as follows. In 1934 and for some years before that date, Mr. Cameron was a director of a private company carrying on business as builder and contractor under the name of Higgs and Hill, Ltd. At the end of 1934 Mr. Cameron intimated to his co-directors that he desired to resign his directorship by giving the appropriate notice required by article 107 (D) of the company's articles of association. As stated in the Case (paragraph 3) the company carried on a prosperous business for which the Appellant was largely responsible. His co-directors did not wish to lose his services, and with that object in view caused to be written to Mr. Cameron a letter dated 17th December, 1934, in these terms: "The Board have considered your recent intimation that, in the exercise of your right so to do under Article 107 of the Company's Articles, you intend forthwith to determine your Directorship, and I am authorised to ask you,

(¹) 16 T.C. 605, at p. 633.

(Luxmoore, L.J.)

“ in the interests of the Company, not to serve such Notice and
“ to say that, in consideration of your acceding to this request,
“ the Company will, within 21 days or by such instalments as
“ you will accept, pay you the sum of £45,000 and will embody
“ their undertaking so to do in a formal deed reciting this letter ”.

On the 31st December, 1934, Mr. Cameron and the company duly executed a deed to give effect to the terms of the letter of the 17th December, 1934. Omitting formal parts the deed is in the following words: “ Whereas Mr. Cameron is a Director of “ the Company And Whereas the Company in the circumstances “ set out in the letter hereunto annexed ” (which is the letter of the 17th December, 1934) “ has for the consideration therein “ specified agreed to make to Mr. Cameron the payments herein- “ after set out And it is hereby agreed between the parties that “ the Company shall pay to Mr. Cameron the following sums on “ the following dates: On the 31st day of December 1934 the “ sum of £35,000 and on the 31st day of March 1935 the sum of “ £10,000 ”.

The Commissioners accepted Mr. Cameron's evidence that he did not know how the sum of £45,000 was arrived at, that he was not present at any of the discussions concerning the matter, and that that sum was offered to him by the two other directors. The Commissioners also found that Mr. Cameron agreed to remain on as director at the salary of £400 per annum on the understanding that he would devote less time in the future to the company's business. They further found that the sum of £45,000 had no reference to any sum or sums in the accounts of the company and that at the time when it was offered to him Mr. Cameron was not aware of the amount of the company's balances or reserves.

The Commissioners discharged the assessment stating their decision in these terms: “ We hold that the Respondent ” [Mr. Cameron] “ received the sum of £45,000 for the consideration “ expressed in the said letter dated 17th December, 1934, and “ embodied in the said deed made 31st December, 1934. We “ accept the deed as genuine and find that the conditions con- “ tained therein have been carried out. We also accept the “ evidence given by the Respondent ” [Mr. Cameron] “ and are “ satisfied that the sum of £45,000 had no relation to any sum “ or sums contained in the Company's Profit and Loss and Reserve “ Accounts or to any possible claim he might have in respect “ thereof ”.

It is said that this is a finding of fact by the Commissioners that the only consideration moving from Mr. Cameron in respect of the £45,000 was the withholding of the notice of resignation and that consequently the payment to him of that sum was not a payment arising from his office of director. If this is the correct

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view with regard to the decision of the Commissioners, I am of opinion that the question being one of construction of the deed and letter, they were not entitled in law so to hold. An agreement not to give a notice of resignation of necessity includes an agreement to continue to act as director for so long as the notice is withheld, and although the result of the payment looked at from Mr. Cameron's side of the bargain is to prevent his resignation, yet when it is looked at from the company's point of view the object is to ensure the continuation of his directorship. Indeed, so far as the company is concerned, the only legitimate ground for making the payment is to induce Mr. Cameron not to resign, and so to continue his services as a director. The fact that the letter and the deed are silent as to any period during which notice of resignation is to be withheld does not, I think, affect the position, although it is not immaterial to remember that at the time the arrangement was entered into there was a contemporaneous agreement on the part of Mr. Cameron to remain as a director at the salary of £400 per annum.

As a matter of construction of the deed and the letter of the 17th December, 1934, it appears to me that the £45,000 must necessarily be held to have been paid by the company to Mr. Cameron in respect of his directorship. The offer in the letter is made in express terms to induce Mr. Cameron not to serve a notice to determine his directorship. The deed, after reciting that "Mr. Cameron is a Director of the Company", refers to the letter as disclosing the consideration for the payments, that is the withholding of a notice "to determine your Directorship".

Mr. Cameron's Counsel placed great reliance upon the decision in *Dewhurst's* case (16 T.C. 605). In my judgment this case is distinguishable from the present. There the payment was made as consideration for the release of Commander Dewhurst's right to receive, under special provisions in the articles of association, a lump sum by way of compensation for loss of office if and when his directorship should cease, and so was not referable to his directorship or to its continuation. The distinction is no doubt a fine one, and the difficulty of decision is illustrated by the marked divergence of judicial opinion in the *Dewhurst* case where, in the result, five Judges held the view that the payment in question was assessable under Schedule E, while four Judges, including the majority in the House of Lords, held that it was not assessable thereunder.

I do not think the answer to the question: "Did the payment "arise from Mr. Cameron's office as director?" can differ, according to the manner in which the consideration for that payment

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is described, so that the answer will be in the negative if the consideration is stated to be the withholding of his resignation and in the affirmative if it is stated to be the continuation of his directorship. In my opinion, in whichever form the statement is made, the other form is of necessity included in it by implication. I appreciate, of course, that there is a distinction between the two forms, but in my judgment there is no difference between them in substance.

I am satisfied that the £45,000 constituted a perquisite or profit coming to Mr. Cameron from his office as director within the precise terms of Rule 1 of Schedule E and was therefore assessable to Income Tax thereunder.

In my opinion the judgment of Lawrence, J., was right, and the appeal should be dismissed with costs. I need hardly say that although I have formed a definite opinion as to the answer to be given to the question to be determined, I express that opinion with diffidence in view of the fact that the Master of the Rolls has arrived at a different conclusion.

Mr. Needham.—I ask your Lordship for leave to appeal in this case.

Finlay, L.J.—Yes. It is certainly a case in which we think leave to appeal should be given. The appeal will be dismissed with costs, and there will be leave to appeal.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Caldecote, L.C., Viscount Maugham, and Lords Russell of Killowen, Wright and Romer) on the 12th and 13th February, 1940, when judgment was reserved. On the 12th March, 1940, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Raymond Needham, K.C., and Mr. R. A. Willes appeared as Counsel for Mr. Cameron, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Caldecote, L.C. (read by Viscount Maugham).—My Lords, the Appellant was at the material time a director of a well-known building company, Higgs & Hill, Ltd. He had been employed by the company for forty-four years and had been a director of the company since 1919. The company was a prosperous one and the Appellant was largely responsible for its success.

(Viscount Caldecote, L.C.)

In 1934 he was minded to resign his position as director because he desired a rest, and he informed his fellow directors of his intention to give notice in writing to the secretary of the company with the result that, by virtue of Article 107 (d) of the Articles of Association, his office would be vacated. The company was, not unnaturally, anxious to retain his services and on 17th December, 1934, a letter was written by the direction of the board to the Appellant informing him that the board had considered his intimation that he intended forthwith to determine his directorship. The letter went on to ask him in the interests of the company not to serve the proposed notice, and stated that in consideration of the Appellant acceding in this request the company would within 21 days, or by such instalments as he would accept, pay him a sum of £45,000. This undertaking would be embodied in a formal deed reciting the letter. The Appellant accepted the offer. Accordingly by a deed of the 31st December, 1934, which recited that the Appellant was then a director of the company and that the company had in the circumstances set out in the letter of the 17th December, annexed to the deed, for the consideration specified in the letter, agreed to make Mr. Cameron two payments amounting in all to £45,000, the first payment on the 31st December, 1934, and the second on the 31st March, 1935, the company bound themselves to make these payments. On the same day a board meeting was held, at which the Appellant was present, and it was resolved that the Appellant should remain on the board of directors in an advisory capacity, and that his remuneration should be fixed at the rate of £400 per annum as from the date of the meeting.

The question which arises in this appeal is whether the Appellant is liable to Income Tax in respect of the sum of £45,000, as being a profit arising from the office of director, under Schedule E of the Income Tax Act. The Special Commissioners have held that the Appellant received the sum in question for the consideration expressed in the letter and embodied in the deed. They accepted the deed as genuine and found that the conditions of the deed had been carried out. They, therefore, held that the sum of £45,000 was not subject to Income Tax under Schedule E in the hands of the Appellant and discharged the assessment. Lawrence, J., reversed this decision on the ground that the true consideration for the payment of the £45,000 must have been the desire of the company that the Appellant should continue as a director with the result that the payment arose from his office as director. The Court of Appeal by a majority approved the judgment of Lawrence, J., and this appeal is from their decision.

Tax is charged under Schedule E in respect of every public office or employment of profit. Rule 1 of the Rules applicable to Schedule E provides that tax shall be charged "on every person

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“ 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 ”. It is admitted that the Appellant’s directorship was an office of profit and that he received the sums in question in the year of assessment while holding that office. The only question, therefore, is whether those payments arose from the office held by the Appellant. We have been invited by learned Counsel on behalf of the Appellant, in considering this question, to fix our gaze on the precise words of the letter of the 17th December. Reference was made to the decision in the *Duke of Westminster’s* case, [1936] A.C. 1⁽¹⁾, in which observations were made by Lord Tomlin and others of your Lordships⁽²⁾ as to the importance of giving effect to the proper legal interpretation of documents, provided they are *bona fide* and not only used as a cloak to conceal a different transaction. It had been argued on behalf of the Inland Revenue Commissioners in that case that the substance of the arrangements contained in the material documents must be regarded, and not merely the form. Such a suggestion found no favour with the majority of the noble and learned Lords who heard that appeal, and I certainly have no intention of departing in any way from what was there laid down. But how does it help the Appellant? In this case the substance and the form of the documents seem to me to be the same. The Appellant was anxious to retire and, but for the inducement offered to him not to do so, he would have signed a notice of resignation. The company valued his services and they were prepared to pay a large sum to him to induce him to abstain from his intention to resign, and thus to continue as director.

Your Lordships are asked to say that, in these circumstances, the only consideration for the payment was the act of the Appellant in acceding to the request of the company not to serve the notice of resignation. If it were not for the approval given by the Master of the Rolls to this submission, I should have thought it only required to be stated to be rejected. I can see no difference between a promise not to resign and a promise to continue to serve as director. It is true that the Appellant did not give any promise in words to continue to serve for any period of time, any more than the board by their resolution of the 31st December named a term of service. It is fair to assume that, in the course of a long connection of the Appellant with the company, his fellow directors had learned that they could trust him. Whether or not it was open to him, having received the sum, to resign immediately afterwards is a question which I find it unnecessary to answer. The

(1) *Duke of Westminster v. Commissioners of Inland Revenue*, 19 T.C. 490.

(2) *Ibid.*, at pp. 520, 521, 524 and 529.

(Viscount Caldecote, L.C.)

Appellant's colleagues on the board no doubt knew the man with whom they had to deal, and were confident that if he received the money they were prepared to pay him they would get good value for it.

My Lords, like the Special Commissioners, I accept the deed as genuine. The consideration stated in the deed for the payment of the money is that the Appellant should not resign. If he resigned, his office as director would cease. If he did not resign, it would continue. To call the continuance of his office a by-product of the undertaking not to deliver notice of resignation⁽¹⁾ seems to me, with all respect to the Master of the Rolls, to be a misdescription of the contract. The continuance of the Appellant in his office was the essence of the bargain. If anything was needed to make plain the intention of the parties as expressed in the letter and in the deed, the minute of the board of the 31st December is conclusive. I agree with the statement by Luxmoore, L.J.⁽²⁾, that, so far as the company was concerned, the only legitimate ground for making the payment was to induce the Appellant not to resign and so to continue his services as a director. The Master of the Rolls was of opinion that if, having received payment of the £45,000, the Appellant had forthwith served a notice of resignation, the company's cause of action would have been for damages for breach of a contract not to serve the notice of resignation. I do not know what damages could be recovered for the breach of such an agreement, if it is to be regarded as a mere contract not to send a piece of paper containing notice of resignation. If, on the other hand, it is something more than that, it could only be what the form of words used in the letter seem to me to express, namely, an agreement to continue as a director of the company in consideration of the payment of £45,000.

Your Lordships were pressed with the decision in *Dewhurst's* case, 16 T.C. 605. I agree with all the members of the Court of Appeal, and with Lawrence, J., that that decision does not cover this case. The facts were, as Lord Warrington said⁽³⁾, very special. Lord Atkin and Lord Thankerton, who decided that case with Lord Warrington in favour of the taxpayer, treated the payment in question as a sum paid for the release of the company from obligations which they would themselves have to meet. The facts of this case are wholly different and are such as to make it impossible to come to a similar conclusion. The conclusion which I have reached is that the payment in question was a payment arising from the Appellant's office. This is, I think, the inevitable result of giving effect to the precise form as well as to the substance of the documents on which the case depends.

(1) See page 131 *ante*.

(2) See page 140 *ante*.

(3) 16 T.C. 605, at pp. 643/4.

(Viscount Caldecote, L.C.)

It follows that, in my opinion, the Order of the Court of Appeal should be affirmed and this appeal dismissed with costs.

Viscount Maugham.—My Lords, as appears from the Case stated by the Commissioners for the Special Purposes of the Income Tax Acts, the only question on this appeal is whether the Appellant is liable to Income Tax in respect of a sum of £45,000 paid to him by a private limited company carrying on business as builders and contractors in which he was a director. The Crown contended that this was a profit arising from the office of director within Schedule E of the Income Tax Act, 1918. The Commissioners discharged an assessment based on that view. On appeal Lawrence, J., held that the Commissioners' determination was erroneous. The Court of Appeal (Finlay and Luxmoore, L.JJ., the Master of the Rolls dissenting) affirmed the decision of Lawrence, J. The Appellant appeals to this House.

The material facts cannot be better stated than they were by Lawrence, J. He said⁽¹⁾: "The Respondent had been for many years a director of a company of builders and contractors. Towards the end of the year 1934, he had intimated to his fellow directors his intention of resigning, as he was entitled to do under article 107 of the company's articles of association. The other directors then wrote to him a letter of the 17th December, 1934, in which, after having considered his recent intimation that he intended forthwith to determine his directorship, they asked him, in the interests of the company, not to serve such notice; and they said that, in consideration of his acceding to this request, the company would, within a certain time, pay him a sum of £45,000, and would embody its undertaking so to do in a formal deed. Then on the 31st December, 1934, the company entered into the deed, which recited that the company, in the circumstances set out in the letter of the 17th December, 1934, had, for the consideration therein specified, agreed to make to the Respondent the payments thereafter set out, that is to say, £35,000 and £10,000. The Commissioners have held that the Respondent received the sum of £45,000 for the consideration expressed in the letter of the 17th December, 1934, and embodied in the deed of the 31st December, 1934. They state that they accept the deed as genuine and find that the conditions contained therein had been carried out".

The deed of the 31st December, 1934, between the company and the Appellant, omitting parties and formal parts, was in these terms: "Whereas Mr. Cameron is a Director of the Company
" And Whereas the Company in the circumstances set out in the
" letter hereunto annexed has for the consideration therein specified

(1) See page 126 *ante*.

(Viscount Maugham.)

“ agreed to make to Mr. Cameron the payments hereinafter set out And it is hereby agreed between the parties that the Company shall pay to Mr. Cameron the following sums on the following dates : On the 31st day of December 1934 the sum of £35,000 and on the 31st day of March 1935 the sum of £10,000 In Witness ”, etc.

The letter annexed was the letter of the 17th December above referred to.

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

The Master of the Rolls in his dissenting judgment, to which I have given the most anxious consideration, seems to have thought the case was in effect decided by the findings in the Special Case. He observed⁽¹⁾ : “ The crucial finding of the Commissioners is as follows : ‘ We hold that the Respondent received the sum of “ £45,000 for the consideration expressed in the said letter dated “ 17th December, 1934, and embodied in the said deed made “ 31st December, 1934. We accept the deed as genuine and find that “ the conditions contained therein have been carried out ’. This “ finding we are not entitled to question, nor are we entitled to say “ that in substance it means something different to what it says ”. And a little later he remarks⁽²⁾ : “ The contract did not impose “ upon the Appellant any obligation to act as a director. It is true “ that so long as he refrained from serving a notice he remained a “ director, but this was a by-product of his undertaking not to “ serve the notice, not the performance of that undertaking ”. With the greatest respect to the Master of the Rolls, I cannot agree. If the finding of the Commissioners is taken literally, I see no reason to quarrel with it ; but if it is to be taken as meaning what the Master of the Rolls appears to extract from the finding, I am compelled to differ. Inferences from facts stated by the Commissioners are matters of law and can be questioned on appeal. The same remark is true as to the construction of documents. If Commissioners state the evidence and hold upon that evidence that certain results follow, it is open to the Court to differ from such a holding. I agree with the remarks of Cozens-Hardy, M.R., in

(¹) See page 130 ante.

(²) See page 131 ante.

(Viscount Maugham.)

The Gramophone and Typewriter, Ltd. v. Stanley, [1908] 2 K.B. 89, at page 95⁽¹⁾, and also with those of Lord Atkinson in *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433, at page 449⁽²⁾.

On the facts found by the Commissioners I should come to the conclusion that the sum of £45,000 was paid to the Appellant by his co-directors, acting for the company, to induce him to continue to serve the company as a director for at least a reasonable time. That was not, I think, a by-product of his undertaking not to serve the notice, but the real and plain meaning of the undertaking. An agreement by the Appellant not to resign his office is precisely similar to an agreement to continue to act as a director. His co-directors must be presumed to be honest men making payment of a large sum in the interest of the company and its shareholders. I hesitate to stigmatize the transaction involved in the payment, if it is to be regarded as really meaning that the Appellant could have given a notice to retire within a few minutes after he received the £45,000, if not before. We must interpret the findings of the Commissioners in the light of common sense and common knowledge. Apart from this view, I think the inference which I have drawn from the findings is a matter of law, based to a large extent on the well-known law relating to directors of a limited company and to their inability to make presents out of the funds of the company to a brother director, or to pay him substantial sums for a clearly nominal consideration. Further, it is important to notice that there was a contemporaneous agreement on the part of the Appellant to remain as a director at a salary of £400 per annum. This circumstance seems to me to afford strong corroboration of the view which Lawrence, J., and Finlay and Luxmoore, L.JJ., have taken of the transaction.

If a sum is paid by a company to a man who has long been and still is a director of the company and whose services are greatly valued, and if the consideration is that he will not resign but will continue to act as a director, I cannot myself doubt that in such a case the sum is a profit of his office and that it is liable to tax, and none the less that the time during which he will continue to be a director is not fixed. This is the view of the Appellant's agreement with the company taken by Finlay, L.J., and by Luxmoore, L.J., in affirming the judgment of the trial Judge; and I agree with their decision and the reasons they have given for it.

I ought to add that in my opinion the case of *Hunter v. Dewhurst*, 16 T.C. 605, is distinguishable from the present case. It was a curious case and occasioned a good deal of diversity of judicial opinion; but in my view it turned on the unusual circumstance that Commander Dewhurst had only to resign his office as

(1) 5 T.C. 358, at p. 374.

(2) 6 T.C. 399, at p. 423.

director to become immediately entitled under article 109 of the company's articles to a sum exceeding £10,000, whilst if he did not resign but remained a director at £250 a year for any length of time (as suggested) he would forfeit far the greater part of the sum payable under article 109. In these circumstances it was held by a bare majority in this House that the sum of £10,000 was paid to Commander Dewhurst to obtain a release of his right to a greater sum under article 109. On this view it was not paid as "wages, "perquisites or profits" derived from his office of director. I do not think this case throws any light on the nature of the payment of £45,000 to the Appellant.

For the above reasons I am of opinion that this appeal should be dismissed with costs.

Lord Russell of Killowen (read by Lord Romer).—My Lords, in my opinion the Order of the Court of Appeal should be affirmed.

The question is whether the sum of £45,000 which was paid to Mr. Cameron was a profit from his directorship. I feel no doubt, upon the facts of this case, that it was. It was paid to him in his capacity of a director and as a consideration for his agreeing not to cease giving his services as a director to the company, an agreement which, as Luxmoore, L.J., pointed out⁽¹⁾, necessarily involves an agreement to continue to render those services. Money paid as a consideration for such a bargain appears to me clearly a profit from his directorship.

It is said that he was at liberty to determine his directorship immediately he had received the £45,000, because he had merely agreed to refrain, at a particular time, from serving a notice to end his directorship. I do not agree. He would have been bound to serve for a reasonable time, the length of which would be judged on a consideration of all relevant circumstances, including the large amount of the sum paid. The other view imputes to the directors that they paid away this large sum for nothing; in other words, that they made a present to their co-director, a thing which neither they nor the company would have any right to do.

It is further said that my view involves a departure from, or a contradiction of, the Commissioners' findings: but that is not the case. Their finding is merely that the deed means what it says, and is not a cloak for some different transaction. But what the deed says is a question of construction, and I have indicated what, in my opinion, it means and involves.

⁽¹⁾ See page 140 *ante*.

(Lord Russell of Killowen.)

The case is not covered or governed by the decision in *Dewhurst's case*⁽¹⁾. The grounds for that decision, so far as they are to be found in the speeches of Lord Atkin and Lord Thankerton⁽²⁾, were that the transaction was the compromise of a money claim against the company by the acceptance of a smaller sum. It bears no resemblance to the present case.

Finally, it was suggested that the moneys paid to Mr. Cameron were in the nature of capital payments: but for this I can see no foundation except the size of the sum involved. That feature alone is no justification for the suggestion.

Lord Wright.—My Lords, Rule 1 of the Rules applicable to Schedule E is expressed in very wide terms. The tax is imposed “in respect of all salaries, fees, wages, perquisites or profits “whatsoever” from the particular office of profit, which in this case is the Appellant’s directorship. The language thus includes casual or extraordinary profits, whatever their size. These wide terms would naturally seem to include the £45,000 in question, which was paid to the Appellant as a director in the past and at the time, and for continuing to be a director, or what is the same thing, for not resigning his directorship. In my opinion, this was the true nature of the payment, and therefore the substance of the transaction. The consideration was correctly and sufficiently expressed in the deed and in the letter which it incorporated. It was there stated that it was in the interests of the company that the Appellant should accede to the company’s request not to serve a notice of resignation. It is clear that the directors thought it worth while in the interests of the company to pay £45,000 to the Appellant to secure the continuance of his services as director. I cannot think that the payment was not a profit from his directorship even though it was a payment on a generous scale and not based on any particular estimate of the company’s earnings. It was in fact an extraordinary payment to secure what the company presumably thought was an adequate advantage, namely, that the Appellant should continue as director and not cease to serve as such. It is said that the consideration was nugatory because it was limited to the mere obligation of the Appellant not to resign at that moment, so that he would not have broken it by resigning next day. The company, however, were dealing with a man who had served their interests faithfully for over forty years, and was not likely to play them a scurvy trick merely because he was generously treated. But as a matter of law I do not agree that the Appellant would not have been breaking his promise if he had resigned next day. His promise, I think, should be construed as a promise not to resign for a reasonable period. Similarly under his contemporaneous agreement to serve in an advisory capacity at

(1) 16 T.C. 605.

(2) *Ibid.*, at pp. 645 and 650.

(Lord Wright.)

£400 a year, which in my opinion was an integral part of the transaction, I think it was implied that he would so serve for a reasonable period. It seems to me that the company paid the £45,000 to the Appellant as an extra remuneration to him for continuing as a director, and he received it on that same footing. In my judgment it fell within the category of "profits whatsoever" of his directorship. This conclusion follows in law from the facts stated.

It was somewhat faintly suggested that the sum was capital, not income. I think this contention is untenable. I fail to see what ground there is for that suggestion. The mere fact that the sum is large is not in itself ground.

I have not found any help from *Dewhurst's* case⁽¹⁾, which, whatever it decides, is on different facts. It is difficult to elicit any principle from the majority decision of the House. Lord Warrington expressly decided it on its special facts. Lord Atkin and Lord Thankerton based their decision, as I understand it, on the ground that the money paid was not a profit from the directorship but the compromise of a future and contingent liability to pay a lump sum on the cessation of his office. Lord Dunedin and Lord Macmillan, who agreed with the Court of Appeal, thought that the payment had the quality of deferred pay and was referable to the terms of the original engagement and was a profit of the directorship. In any event, the decision, as I have said, turned on different facts and furnishes no principle which helps in the present case.

In my opinion, the appeal should be dismissed.

Lord Romer.—My Lords, the question to be determined in this case lies within a narrow compass. It can be stated quite shortly as follows: was the £45,000 paid to the Appellant as the consideration for a promise on his part to continue the performance of his services as a director of the company? If this question be answered in the affirmative, the appeal must fail. For the sum would in that case clearly be part of the "salaries, fees, wages, "perquisites or profits" from the Appellant's office of director within the meaning of Rule 1 of the Rules applicable to Schedule E of the Income Tax Act, 1918. It matters not that the sum is a lump sum payable at once instead of being spread over a number of years, and depending in no way upon the number of years already spent or to be spent in the future by the Appellant in the office. Nor does it matter that the sum is so large as to present the appearance of a capital rather than an income payment. If a company chooses to pay a director's remuneration in a lump sum, it can, no doubt, lawfully do so. But the sum nevertheless represents income, whatever its amount, and will be taxable as

⁽¹⁾ 16 T.C. 605.

(Lord Romer.)

such. Remuneration which, if paid by instalments over a number of years, would be income is income though paid once and for all in a lump sum; just as much as the capital consideration for a sale (say) of land is capital, even though payable by instalments spread over a number of years.

My Lords, turning now to the question that I have stated above, I confess that to my mind it admits of only one answer, whether one considers the deed of the 31st December, 1934, and the letter of the 17th December, 1934, annexed thereto alone, or whether one considers, as forming part of the same transaction, the deed, the letter, and the minute of the resolution passed at the board meeting of the 31st December, 1934, together. Taking the deed first, it will be seen that the consideration for the agreement by the company to pay the £45,000 is expressly stated to be that specified in the letter, and the consideration specified in the letter is the acceding by the Appellant to the request of the company not to serve a notice exercising his right under article 107 of the company's articles of forthwith determining his directorship. This surely makes it as plain as language can do that in consideration of the payment of £45,000 the Appellant will not determine his directorship; in other words, for it means precisely the same thing, that he will continue to act as a director. It was submitted on behalf of the Appellant that this conclusion as to the consideration moving from him for the company's agreement to pay the £45,000 in effect reverses and disregards findings of fact by the Special Commissioners by which every Appellate Tribunal was bound. The findings referred to were in the words following: "We hold that the Respondent received the sum of £45,000 for the consideration expressed in the said letter dated 17th December, 1934, and embodied in the said deed made 31st December, 1934. We accept the deed as genuine . . ." But the conclusion I have arrived at as to the true nature of the consideration in no way impugns the genuineness of the deed, and is in truth founded upon the language of the deed and letter and nothing else. I merely differ from the Commissioners as to the proper construction of that language, and, as pointed out by Luxmoore, L.J., its proper construction is not a question of fact but of law.

In my judgment, therefore, the case of the Appellant fails even if the deed and the letter are looked at without reference to the minute of the 31st December, 1934. It is plain, however, that the resolution recorded in the minute must have formed part of the arrangement come to between the Appellant and the company and cannot in this connection be disregarded. For the deed and letter by themselves would lead to the conclusion that the duties and yearly remuneration of the Appellant as a director were to be as theretofore. The minutes, however, show quite plainly that this

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was not so and that the deed and letter do not record the whole of the terms of the arrangement then being made. When all three documents are read, as they should be read, together, the arrangement made becomes quite clear. In consideration of the payment of £45,000, the Appellant agreed to continue to act as a director in an advisory capacity at the reduced remuneration of £400 per annum as from the 31st December, 1934.

For how long he was to continue so to act is not specified. But his fellow directors were no doubt willing to trust to his honour not to resign his directorship unless by reason of ill-health or some such material change of existing conditions he should be compelled to do so. In any case it would be an implied term of his agreement that he should continue to act for a reasonable time.

It only remains to say a word or two about *Dewhurst's* case, 16 T.C. 605, upon which the Appellant placed great reliance. It is sufficient to say that the agreement which their Lordships had to consider in that case was in many respects different from the agreement in the present one. The case laid down no principle of construction and can, therefore, have no conceivable bearing upon the question of construction with which your Lordships are now concerned.

For these reasons, which are substantially the same as those given by Finlay and Luxmoore, L.JJ., in the Court of Appeal, I am of opinion that this appeal should be dismissed with costs.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Edell & Co.]
