Monday, April 30.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

INLAND REVENUE *v.* SHAND.

(In the Court of Session, June 13, 1922, S.C. 555, 59 S.L.R. 436.)

Revenue—Income Tax—Profits and Gains — Commission or Bonus on Company's Net Profits—Perquisites—Whether Assessable on Three Years' Average or on the Receipts of the Preceding Year—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 146, *Schedule E, Rules* 1 *and* 4—*Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule E.*

By the terms of his appointment the manager of a limited company received as remuneration an annual salary of a fixed amount, and also a commission or bonus on the company's net profits in each year. The Revenue having proposed to assess both salary and bonus upon the amount received in respect of the year of assessment under Rule 1 of Schedule E, *held* (*aff.* the judgment of the First Division) that the commissions fell to be assessed, not under Rule 1 of Schedule E but as "perquisites" under Rule 4 of that schedule, and might be estimated therefore either upon the amount received in the preceding year or upon the average of the three preceding years.

The case is reported *ante ut supra.*

The Inland Revenue appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellant, counsel for the respondent being present but not being called upon, their Lordships delivered judgment as follows:—

EARL OF BIRKENHEAD—This is an appeal against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland on an appeal by Duncan M'Donald, His Majesty's Inspector of Taxes at Glasgow, under the Taxes Management Act 1880, from the determination of the Commissioners for the General Purposes of the Income Tax Acts relative to assessments made upon the respondent under the provisions of those Acts.

At or before the hearing certain facts were admitted or were proved. The respondent, as general manager of Nobel's Explosives Company, Limited, under an agreement to which in a moment I will more particularly refer, received during the years 1914 to 1917 a fixed salary and commission or bonus on the company's revenue. During those years, and for a series of years prior thereto, he was assessed under Schedule E upon the amount of the salary received by him during the year of assessment, together with an amount equal to the average of the bonuses received by him during the three years preceding the year of assessment. Then additional assessments were made which are the subject of the present appeal, under which it was proposed to assess both salary and bonus upon the amounts received or receivable by the respondent in respect of each year of assessment. Only one point, and that within the briefest possible compass, requires determination by your Lordships, and that is whether the bonuses under discussion are to be assessed under Rule 1 or under Rule 4 of section 146 of the Income Tax Act 1842, Schedule E. No dispute arises in relation to the figures.

It is convenient that I should call attention to the terms of the agreement between Nobel's Explosives Company, Limited, and Francis James Shand, dated 18th and 19th August 1914. The material clause is the eighth—"The company shall pay the said Francis James Shand in remuneration for his services under this agreement a fixed salary at the rate of fifteen hundred pounds per annum, and in addition a bonus for each twelve months equal to one and a quarter per cent. of the total revenue of the Nobel Dynamite Trust Company, Limited, of London, as shown by the addition on the credit side of the published profit and loss account of that company, provided that the total remuneration payable to the said Francis James Shand under this clause shall not be less than at the rate of four thousand pounds for each period of twelve calendar months." The result of this eighth clause of the agreement is that a guaranteed minimum sum of £4000 a-year shall in any event be paid to Francis James Shand, but there is a possibility depending upon the revenue of the company that by the operation of the bonus the total moneys payable to him will exceed the sum of £4000 a-year.

It is next convenient to examine shortly the terms of the rules under Schedule E. I will first read the material words in the First Rule, the contention of the Crown, of course, being that this case is governed by the words of that rule—"The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bona fide* paid and borne by the party to be charged; and each assessment in respect of such offices or employments shall be in force for one whole year, and shall be levied for such year without any new assessment," and then follow words with which we are not so closely concerned. The Fourth Rule is the following:—"The perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year or of

the fair and just average of one year of the amount of the profits thereof in the three years preceding, such years in each case respectively ending on the fifth day of April in each year, or such other day of each year on which the accounts of such profits have been usually made up."

The first observation which I think falls to be made is that in construing Rule 4 one must bear in mind that the Legislature had already placed on record Rule 1. In other words, when they deal with "perquisites" in Rule 4 it is to be assumed that they had in their minds the provisions of Rule 1, and intended in the language which they employed in Rule 4 to provide for a distinguishable, and indeed for an already distinguished, case. Bearing that observation in mind, what conclusion is to be drawn? It is, I think, evident that the scheme of the First and Fourth Rules of section 146 is that fixed emoluments, such as salary, shall be assessed on the basis of the sum receivable during the year of assessment, but that profits which vary from year to year shall be assessed by way of estimate at the recipient's option either on the profits of the preceding year or on the fair average of one year of the amount of the profits in the three years preceding. The First Rule is intended, as I read it, to define the extent of the charge, and it accordingly uses wide words in order to bring within the charge all profits whatsoever accruing by reason of the office. The object of the Fourth Rule, on the contrary, is to deal in a more specific manner with profits which vary, and here the important words from the point of view of the subject-matter of the present appeal are the definition of "perquisites." It is at first sight not altogether easy to see what in the definition of "perquisites" in the Fourth Rule is added to the definition of "perquisites" in the First Rule, but the words about which an observation falls to be made in the definition of "perquisites" in the later rule are—"Such profits of offices and employments as arise from fees or other emoluments, and payable in the course of executing such offices or employments." What is the purpose of the definition? It surely must be to ascertain what are the profits which are to be assessed either by reference to the receipts of the year preceding the year of assessment or by reference to the average of the three preceding years. The words that are used are —"Such profits of offices and employments as arise from fees or other emoluments."

Is it possible to contend with success that a bonus payable under the circumstances provided for by the clause of the agreement I have read is not a "perquisite" in the sense in which "perquisite" is explained by the words that follow it in Rule 4? Infinite disputation is possible as to what in different contexts may be the proper connotation of a term such as "perquisite." In one context it may have a bad or an irregular connotation; in another it may be normally ranged under payments which are both frequent and regular in commercial transactions. I am to put a meaning upon "perquisites" in the context of the rule, and I derive no small degree of guidance from the words which follow, to which I have directed attention—"Such profits of offices and employments as arise from fees or other emoluments." The Lord Advocate in his clear argument says that I am to read "emoluments" as being *ejusdem generis* with "fees." Be it so. With what am I to read "fees" as being *ejusdem generis?* What definition of the term "fee" am I to adopt which would exclude a payment by way of bonus such as that which is stipulated for under clause 8 of this agreement.

For these reasons, in a case which seems to me to be very clear, I reach the conclusion that the decision of the Commissioners was right and ought to be affirmed, and that this appeal should be dismissed, and I move your Lordships accordingly.

VISCOUNT FINLAY—I am of the same opinion. Under the First Rule certain duties are imposed "for all salaries, fees, wages, perquisites, or profits whatsoever" arising from certain offices, employments, and pensions mentioned in the schedule. Then the rule goes on to say that each assessment shall be in force for a whole year. In the enumeration in that rule you have "perquisites" and it seems to be considered desirable to define the word "perquisites." "Perquisite" is a word which may, according to the connection in which it is used, have a variety of different meanings, and a definition is given accordingly by Rule 4 which in some respects may be taken as extending the meaning of the term "perquisites"—The 'perquisites' to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments and payable either by the Crown or the subject in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year or of the fair and just average of one year of the amount of the profits thereof in the three years preceding." The first observation to be made, I think, on this rule is that the words "to be such profits as arise from fees" are clearly to be read with the words "in the course of executing such offices or employments." You have got words intervening referring to the question by whom the fees are to be paid, and saying it does not matter whether they are payable by the Crown or the subject. The profits are to be such profits as arise from fees or other emoluments in the course of executing such offices or employments. There is nothing that I can find there to denote that the fee or perquisite is to be payable on the doing of a particular act. In most cases I dare say it will be so, but it is quite enough if it is a payment which arises in the course of the employment.

The object of Rule 4 was to deal with a case where owing to the manner in which the charge was made you could not say till the period had elapsed what the amount was, because if a fee is to be charged either on doing a certain act or on the happening of a certain event you cannot say until the period has run out how often that act has

been done or how often that event has happened. For that reason Rule 4 gives the definition, according to my reading of the rule, really with a view to the special provision which immediately follows as to the mode of assessment. It deals with the case of profits which could not in the nature of things be ascertained till the year runs out, and then it says they may be estimated either on the profits of the preceding year or on the fair and just average of one year of the amount of the profits thereof in the three years preceding.

That seems to me to be the fair meaning of the rule, and I can entertain no doubt whatever that the decision of the Court below was right and that this appeal should be dismissed.

LORD DUNEDIN — I think this was a hopeless appeal, and I concur in the judgment proposed.

LORD ATKINSON—I concur.

LORD SHAW—I quite agree.

Their Lordships ordered that the interlocutor appealed from be affirmed and that the appeal be dismissed with costs.

Counsel for the Appellants—The Attorney-General (Sir Douglas Hogg, K.C.)—The Lord-Advocate (Hon. William Watson, K.C.) — Hills — Skelton. Agents—Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue—J. H. Shaw, Solicitor for England of the Board of Inland Revenue.

Counsel for the Respondent—Moncrieff, K.C.—Normand. Agents—Webster, Will, & Company, W.S., Edinburgh—Grahames & Company, Westminster.