HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—24TH AND 25TH JULY, 1945

COURT OF APPEAL—26TH, 27TH AND 28TH NOVEMBER, 1945

HOUSE OF LORDS—6TH, 7TH, 20TH, 21ST, 24TH AND 25TH FEBRUARY AND 1ST APRIL, 1947

COMMISSIONERS OF INLAND REVENUE *v.* GARDNER MOUNTAIN & D'AMBRUMENIL, LTD. (1)

Profits Tax—Underwriting agents—Commissions receivable under agreements with Lloyd's underwriters—Date at which commissions to be credited in computing profits.

The Company, whose business included that of underwriting agents, entered into agreements with certain underwriters at Lloyd's, under which it was entitled to receive, as remuneration for its services in conducting the agency, commissions on the net profits of each year's underwriting. The agreements provided, inter alia, *that accounts should be kept for the period ending* 31*st December in each year, and that "each such account shall be made up and balanced at the end of the "second clear year from the expiration of the period or year to which "it relates and the amount then remaining to the credit of the account "shall be taken to represent the amount of the net profit of the period "or year to which it relates and the commission payable to the Com-"pany shall be calculated and paid thereon".*

The Company's accounts were made up for years to 31*st March, and in the accounts for the year to* 31*st March,* 1939, *which formed the basis of the first assessment to Profits Tax (then known as National Defence Contribution) for that chargeable accounting period, there were credited the commissions on underwriters' profits from policies underwritten in the calendar year* 1936. *The commissions on underwriters' profits from policies underwritten in the calendar year* 1938, *when ascertained, were greater than those for the calendar year* 1936, *and an additional assessment was made in respect of the excess. On appeal against this additional assessment, the Company contended that the contracts into which it entered were executory contracts, under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account; that the profit in the form of commission was not ascertainable or earned, and did not arise, until that time, and that the additional assessment should accordingly be discharged.*

The Special Commissioners allowed the Company's appeal, and discharged the additional assessment.

Held, *that, on the true construction of the agreements, the commissions in question were earned by the Company in the year in which the policies were underwritten, and must be brought into account accordingly.*

(1) Reported (H.L.) 177 L.T. 16.

CASE

Stated under the Finance Act, 1937, Section 24(2) and Part II of the Fifth Schedule and 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. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 8th September, 1942, Messrs. Gardner Mountain & D'Ambrumenil, Ltd. (hereinafter called "the Com-"pany") appealed against an additional assessment to the National Defence Contribution in the sum of £18,678 made upon it for the chargeable accounting period from 1st April, 1938, to 31st March, 1939, in respect of the profits of its business.

The Company's business consists of two parts, that of insurance brokers and that of underwriting agents. The only question before us was as to the correct method of computing the profits from the underwriting agency.

2. In the circumstances and for the reasons hereinafter appearing, the Company brought into its account for the year ending 31st March, 1939, the commissions on underwriters' profits from policies underwritten in the calendar year 1936. The commissions were brought into charge on this basis in a first assessment to the National Defence Contribution for the aforesaid chargeable accounting period to 31st March, 1939. The commissions on underwriters' profits from policies underwritten in the calendar year 1938, when ascertained, proved to exceed those for the calendar year 1936, brought into account as aforesaid for the year ending 31st March, 1939, by a sum of £18,678, and, as stated above, an additional assessment was made in this sum.

The question at issue before us was whether the commissions proper to be brought into assessment for the chargeable accounting period to 31st March, 1939, were, as the Company contended, those relating to policies underwritten in the calendar year 1936, or, as the Crown contended, those relating to policies underwritten in the calendar year 1938.

3. The Company, which was incorporated in 1902, acted for certain underwriters at Lloyd's, who formed themselves into syndicates, the members of the syndicates being known as "Names". The Names were insurers of various types of risk, including marine risks (ships and cargoes), fire risks on traders' stocks and accident risks. The functions of the Company were to obtain Names and, on behalf of the group of Names for which it acted, to accept risks, issue policies, collect relative premiums, settle claims and adjust returns of premiums when due.

4. The universal practice of Lloyd's is for underwriting accounts to be drawn up by reference to the calendar year but for the accounts to be kept open for a certain time (usually three years) to allow for various adjustments in the manner hereinafter stated in paragraph 12. The accounts of the Company are made up to 31st March in each year.

5. The Company worked for three syndicates — F. G. Hall syndicate, G. Simmons syndicate and Carisbrooke syndicate, with

each of the Names in which it entered into an agreement. A skeleton agreement form applicable to the Names in the F. G. Hall and G. Simmons syndicate is annexed hereto, marked "A1", and forms part of this Case(1).

Under clause 1 of the agreement the Company is authorised to act as the underwriter's agent and to carry on the ordinary business of underwriter at Lloyd's in his name and on his account.

Clause 8 provides that: "The Underwriter shall pay to the Company as remuneration for its services in conducting the agency a fixed salary at the rate of pounds per annum and pounds expenses ... and a commission of per cent. on the net profits on each year's underwriting... The said fixed salary and expenses shall be paid quarterly and shall be treated as an outgoing of the Underwriting."

Clause 9 provides that: "The said fixed salary and expenses shall cease at the termination of the agency but after such termination (whether by death of the Underwriter or otherwise) the Company shall be entitled to wind up the underwriting and the accounts in connection therewith and shall be paid for its services in connection therewith a remuneration of not less than One hundred guineas".

Clause 10 provides that: "An account shall be kept for the period ending the Thirty-first day of December", next after the agency commences, "and for each subsequent year of the agency ... and each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the Company shall be calculated and paid thereon Provided Always that for the purpose of ascertaining the commission payable to the Company the account for each period or year shall be treated as a separate account and the profits of any one period or year shall not be affected by the result of the underwriting done in any other period or year."

Clause 12 provides that: "In the event of any transaction relating to the underwriting carried on in any period or year being left outstanding when the account for such period or year is made up and balanced any payments or receipts which may afterwards result from such transactions shall be carried to the debit or credit as the case may be of the account for the next year as if the transactions giving rise thereto had occurred in that year Provided Always that in the event of the termination of this Agreement the account may at the discretion of the Company remain open until all risks have run off and the business shall have been completely wound up."

Clause 14 provides that: "Either of the parties may terminate the agency on the Thirty-first day of December", in a particular year, or on the Thirty-first day of December of any succeeding year by giving to the other party six months' previous notice in writing of his or its intention to do so."

6. A skeleton agreement form applicable to the Names in the Carisbrooke syndicate is annexed hereto, marked "A2" and forms part of this Case(1). The substantial difference between this agree-

(1) Not included in the present print.

ment and the agreement exhibit "A1" is that the Company receives no salary but only a commission on the net profits resulting from each year's underwriting.

7. A copy of the Company's profit and loss accounts for the years ended 31st March, 1939, 31st March, 1940, and 31st March, 1941, is annexed hereto, marked "B", and forms part of this Case(1). For the year ended 31st March, 1939, the commission for the Company's underwriting agencies is shewn as £1,728, this figure relating to underwriting transactions initiated in the calendar year 1936. The commission figure relating to such transactions initiated in the calendar year 1938 is £21,995, which is shown among the items for the year ended 31st March, 1941. In each year the fixed salaries are credited in the year to which they relate.

8. A copy is also annexed hereto, marked "C", and forming part of this Case(1), of a statement showing the composition of the commission figures for the same years appearing in the profit and loss accounts, divided between the various syndicates for which the Company worked.

In addition to the three syndicates referred to in paragraph 5 hereof, there are items against the Names of Stafford Knight and others, and Kirk & Randall. In the case of Stafford Knight and others, this is a sub-agency in respect of which the Company was entitled to 60 per cent. of the commission of the agent. In the case of Kirk & Randall, this is an old agency in which the year 1922 had been kept open and was only finally closed in 1936.

9. In addition, a copy is annexed hereto, marked "D", and forming part of this Case(1), of the underwriting accounts with the aforesaid syndicates. The earliest transactions to which these accounts relate are those initiated in the calendar year 1938 which appear under the heading "1938". The commissions resulting from these transactions appear as follows :—

	£	*s.*	*d.*
with F. G. Hall syndicate	18,051	19	1
from Stafford Knight	883	7	0
with G. Simmons syndicate	17,160	17	4
with Carisbrooke syndicate	3,844	3	10

These figures appear under the 1938 heading in the statement marked "C" referred to in the last preceding paragraph of this Case: after deduction of amounts paid out to employees (which are sub-commissions) they give a total figure of £21,994 11*s.* 3*d.*, corresponding to the figure of £21,995 shown in the Company's profit and loss accounts (annexe "B"(1)) among the items for the year ended 31st March, 1941.

10. Underwriters at Lloyd's are required to enter into a trust deed under which each of the Names forming a syndicate agrees with the other Names, and with the company acting as agents for them, and with Lloyd's, that premiums on the policies undertaken shall be held on trust until there are free sums which can be made over to the Names. A copy of the form of trust deed in use is annexed hereto, marked "E", and forms part of this Case(1). The period for which the premiums are held on trust extends to the end of the second clear year after the calendar year in which the relative policies are taken out, or for such longer period as may be necessary or agreed upon.

(1) Not included in the present print.

11. Any person applying for admission as an underwriting member of Lloyd's is required to sign an undertaking in accordance with the rules of Lloyd's. A copy of the form of undertaking in use is annexed hereto, marked "F", and forms part of this Case(1).

Clauses 4 and 5 of the undertaking are as follows : —

"4. That I will submit my Underwriting Accounts to Audit from "time to time as required by the Committee, and that I will on or "before the 15th March in the year 19 , and every subsequent year "of my Underwriting Membership, lodge with the Committee a "Certificate or Certificates in such form as the Committee may from "time to time require of a Public Accountant approved by them.

"5. That all my premiums and other underwriting monies and "any investments thereof shall, subject to net profits only being "drawn therefrom, at all times be placed and held in trust for the "payment of my underwriting liabilities and expenses and so as to "be legally secured and exclusively applicable for that purpose."

A copy is also annexed hereto, marked "G", of Lloyd's Instructions for the Guidance of Auditors(1).

12. Evidence, which we accepted, was given before us to the following effect by Mr. D'Ambrumenil, who has been chairman of the Company since 1937, and who for many years has been a member of the committee of Lloyd's.

The total premium income for any underwriting account initiated in a given calendar year could not be known at the end of that year. For example, an additional amount of premium would be payable if a ship were sent, say, to Northern Russia and the original amount of premium did not cover the risk thereby involved. Again, a vessel might be laid up in port, and a rebate of the premium would be made, known as a return of premium: the return might not take place until the following year. Furthermore, stock might be insured on the highest value known at the time: stocks were valued monthly, and a repayment of premium, or on the other hand an extra premium, might become payable according to the monthly fluctuations in value.

There was always long delay in connection with claims for adjustments. Risks underwritten could not always be ascertained even at the end of the second year following the year of underwriting; in those cases the account was closed, and a premium was paid to reinsure any outstanding liability.

As a matter of business, it was impossible to ascertain in the initial year what commission would accrue to an agent with regard to risks underwritten in that year. The work of the agent which might be expected to run over the initial year would be the late signing of certain policies, the collection of monies due in account from brokers, dealing with increases or returns of premium, reinsurances, claims arising on the policies, making up of accounts and audit of figures. There was normally, in the case of disputed claims, as much for the agent to do in the second and third years as in the first year. Where no claim arose, the work of the agent (after the acceptance of the risk and the fixing of the premiums) was clerical, but the work in connection with claims was largely of an expert nature.

(1) Not included in the present print.

No profit was made on underwriting unless a sufficiently large proportion of the risks ran clear, but the salaries for which the agreement (annexe "A1")(1) provided were receivable by the Company whether a profit was made or not. The salary was more or less a standard fee.

If it were feasible (which it was not) for the Company to keep its accounts to March, 1939, open till March, 1941, it would be possible to ascertain the amount of commission which had been earned in respect of underwriting contracts entered into in 1938.

13. Evidence was also given before us by Sir Alan Rae Smith, a Fellow of the Institute of Chartered Accountants. He stated that, in his view, the £21,995 (referable to transactions initiated in the calendar year 1938) had been correctly brought into the Company's profit and loss account for the year ended 31st March, 1941. It would be impracticable to keep the accounts open for three or four years. The commission was, in his opinion, really earned during the three years over which services were rendered to the Names by the Company. He expressed these opinions from an ordinary accountancy point of view. He himself had not audited the accounts of any firm of underwriters, and did not think that his firm were auditors to any of Lloyd's underwriting syndicates.

14. Further evidence, which we accepted, was given by Mr. D. Cann, a chartered accountant and partner in the firm of Baker Sutton & Company, who were on Lloyd's panel of accountants whose certificate was accepted by Lloyd's on underwriters' accounts. Mr. Cann stated that he had for many years been familiar with the keeping of accounts both of underwriters and of their agents. He was also familiar with the underwriters' agreements, and with Lloyd's Instructions.

In the present case the Company's agency accounts had been kept properly and in accordance with the usual practice. It is not practicable to take credit for the commission at the end of the calendar year in which the risk was insured, for the profit (if any) on which the commission was calculated depended on events some of which would happen after the end of that year. Underwriters kept accounts which ran for three years, and during that period nothing could be released to the Name until the end of the third year.

(In the witness's opinion, the Company's commission on risks underwritten in 1938 was correctly treated as an element in the computation of the profits for the year ended 31st March, 1941.)

15. Mr. Cann also gave evidence, which we accepted, with regard to the so-called "conventional" and "legal" bases of assessment, letters of 7th April, 1922, and 18th May, 1922, which passed between the Inland Revenue authorities and Lloyd's being put to him. A copy of this correspondence is annexed hereto, marked "H", and forms part of this Case(1). The term "conventional basis" is used therein for the method under which the profits of an underwriter or an underwriter's agent ascertained, say, at December, 1939, in relation to underwriting originated (that is to say, risks underwritten) in the year to December, 1937, are treated as the profits of the year ending December, 1939, and, consequently, as assessable to Income Tax for 1940-41. The term "legal basis" is

(1) Not included in the present print.

used for the method under which the profits of an underwriter or his agent so ascertained at December, 1939, are treated as the profits of the year ending December, 1937, and consequently as assessable to Income Tax for 1938-39. Underwriters and underwriter's agents who commenced business prior to 1922 are still assessed on the "conventional" basis but new underwriters and underwriter's agents are assessed on the "legal" basis.

Mr. Cann agreed that in the letter dated 7th April, 1922, underwriting commission as well as underwriting profits is referred to but he stated that, while the "legal basis" had come into force as regards underwriters who had commenced business since the year 1922, he could not say of his own knowledge if it had been applied to underwriting agents. He drew a distinction between underwriters themselves and underwriting agents. In the case of the former, as a general rule the money was received in the shape of premiums in the first year, although the profit could not then be ascertained because it was subject to unknown deductions. In the case of the agent, however, not only was the commission not ascertainable until the end of the three years, but there was nothing in the nature of commission monies in the agent's hands.

The whole of the premiums received on behalf of the underwriter and the account into which they were paid were under the agent's control, but the money was in trust during the three year period. During that period salaries, etc., were paid out of the account in accordance with the agreement, and at the end of the period the underwriter's profit was ascertained, and the agent took his commission as part of the net profit.

(In witness's opinion the "conventional basis" was the correct commercial basis, so far as underwriting agents were concerned. With regard to underwriters themselves, his view might perhaps be different. The services of the agent extended into the second and third years of the three-year period.)

16. It was contended on behalf of the Company that the contracts into which it entered were executory contracts, under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account. The profit in the form of commission was not ascertainable or earned, and did not arise, until that time. Consequently for the year under appeal, 1938-39, the Company had been correctly and fully charged under the first assessment to the National Defence Contribution, which brought into charge the commissions ascertained after 31st December, 1938, on underwriters' profits from transactions initiated in 1936. The additional assessment which was based on commissions ascertained after 31st December, 1940, on underwriters' profits from transactions initiated in 1938, was therefore not justified in law and should be discharged.

17. It was contended on behalf of the Crown that, under the terms of the agreements entered into by the Company, their commissions were earned in the respective years in which the policies were underwritten, and that it was immaterial in law that the amounts of the said commissions were not ascertained until two years later. The additional assessment to National Defence Contribution for the year 1938-39 had been correctly made in accordance with the law and should be confirmed.

18. We, the Commissioners who heard the appeal, having considered the evidence and arguments addressed to us, gave our decision in the following terms:—

(1) The underwriter's profit, on which the agent's commission depends, does not normally emerge for a considerable time. For this reason Lloyd's underwriters have adopted the method of accounting, known as "the conventional basis", under which results are brought to profit and loss account in the second year after the end of the first year—i.e., that in which the policy is underwritten. The Appellant Company, in common with other agents, has adopted and consistently employed the same method. Thus it brought into its account for the year to 31st March, 1939, the commissions of underwriters' profits, ascertained in December, 1938, from policies underwritten in 1936.

(2) The present case raises the question what is the proper basis of liability to National Defence Contribution in the case of the underwriter's agent, and we are concerned with that question alone. The answer is not necessarily the same as in the case of the underwriter, if only because the agent's reward (salary, etc. and commission) is not related in the same way to the undertaking of a risk in the first year, but is earned by agency services over an indefinite period.

(3) That period normally extends well beyond the end of the first year, and in the circumstances we do not think the Crown is right in its contention that the part of the agent's reward which takes the form of commission is earned in the first year and, when received, should be related back to that year.

(4) The only alternative put to us was "the conventional basis" indicated in paragraph (1) above. The agent's services under his contract may extend to the end of the second year there referred to, or may be completed at some earlier date. In this respect, therefore, "the conventional basis" does not seem equally appropriate to every case, even though the commission may not be known till the end of the underwriters' second year. However it is obviously convenient and has the support of accountancy evidence. We see no good reason for rejecting it and accordingly allow the appeal, and discharge the additional assessment before us.

19. The Appellants immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Section 24(2) and Part II of the Fifth Schedule and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

G. R. HAMILTON, } Commissioners for the Special Purposes
H. H. C. GRAHAM, } of the Income Tax Acts.

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18th October, 1943.

The case came before Macnaghten, J., in the King's Bench Division on 24th and 25th July, 1945, and on the latter date judgment was given against the Crown, with costs.

Mr. D. L. Jenkins, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Cyril L. King, K.C., and Mr. J. S. Scrimgeour, K.C., for the Company.

JUDGMENT

Macnaghten, J.—This is an appeal by the Commissioners of Inland Revenue from a decision of the Special Commissioners with regard to an additional assessment made upon the Respondent under the National Defence Contribution for the chargeable accounting period 1st April, 1938, to 31st March, 1939. The Respondent, Messrs. Gardner Mountain & D'Ambrumenil, Ltd., is a company registered under the Companies Acts, and it carries on the business of insurance brokers and also that of underwriting agents. The controversy in this case arises with respect to the profits which the Respondent made in the period in question in respect of its business as underwriting agents, and in no way is it concerned with its profits as brokers.

The Respondent acted as agents for underwriters in the manner customary at Lloyd's, entering into agreements with each of the "Names" for whom it underwrote policies of insurance. Under the rule of Lloyd's, the account with each Name has to be an account for the calendar year terminating on 31st December. By these agreements it was provided that an account shall be kept for the period ending 31st December in each year, "and all premiums salvages re-"insurance recoveries and other receipts and all losses averages "returns of premium and other payments and outgoings including "cost of re-insurance if any of outstanding liability in respect of "the underwriting carried on during each such period or year shall "be carried to the account for such period or year and each such "account shall be made up and balanced at the end of the second "clear year from the expiration of the period or year to which it "relates and the amount then remaining to the credit of the account "shall be taken to represent the amount of the net profit of the "period or year to which it relates and the commission payable to "the Company shall be calculated and paid thereon".

The question at issue in this case is whether the commissions received by the Respondent ought, for the purpose of computing its profits, to be credited—as the Respondent contends—at the dates when they were actually received, or, as the Appellants contend, at the dates when the policies were underwritten. It was said on behalf of the Appellants that the Respondent earned its commission by underwriting the policies, and, though the commisison in respect of any policy would not be paid for a year or two years or more later, it ought to be credited in the Respondent's accounts at the earlier date. Against that contention it was pointed out that, after the risk on any policy had run off, there was still a great deal of work to be done by the Respondent with regard to the settlement of losses, returns of premiums, re-insurances and various other matters, and that, until those matters had been settled and the account had been finally wound up, the amount of the commission could not be ascertained. It was not the fact, it was said, that the Respondent had

(Macnaghten, J.)

earned its commission when it underwrote a policy for its Name; it did not earn its commission until it had wound up the account.

The Special Commissioners gave their decision in favour of the Respondent, and I think that they were plainly right.

Mr. Jenkins, for the Appellants, relied on the provision in the agreements made by the Respondent with its Names that either party might terminate the agency on the 31st December of any year by giving the other party six months' previous notice in writing of his intention to do so, and that at the termination of the agency, whether by death of the underwriter or otherwise, the Respondent should be entitled to wind up the underwriting and the accounts in connection therewith and should be paid for its services in connection therewith a remuneration of not less than one hundred guineas. Now, I think it is plain that the agreement contemplates that, although it may be terminated by notice at the end of any year, it will in the ordinary course continue for a succession of years, and it is clear that the Respondent is bound to perform, so long as the agreement is subsisting, all that may be necessary to wind up the underwriting. If the agreement were terminated by notice or by death and the Respondent declined to exercise its option to wind up the underwriting, and someone else did that part of the work, a question might, I presume, arise as to whether the Respondent would be entitled to the full amount of the commission provided for in the agreement; but, in my opinion, the provision for the termination of the agreement does not affect the question at issue on this appeal.

I therefore think the Special Commissioners were right, and this appeal must be dismissed.

Mr. King.—With costs, my Lord ?

Macnaghten, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Greene, M.R., and MacKinnon and Tucker, L.JJ.) on 26th, 27th and 28th November, 1945, and on the last-named date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

Mr. D. L. Jenkins, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Cyril L. King, K.C., and Mr. J. S. Scrimgeour, K.C., for the Company.

JUDGMENT

Lord Greene, M.R.—The question raised by this appeal relates to certain profits earned by the Respondent Company in that part of their business which consists of undertaking agencies for syndicates of underwriters at Lloyd's.

The question, shortly put, is this: Is the commission which the Company earns under certain agreements to be brought into account in ascertaining its profits for the underwriting year, or is it to be brought into account when it is received, which, in the normal case, will be at the end of the second year after the conclusion of the underwriting year ?

(Lord Greene, M.R.)

In order to make that a little more intelligible, it is necessary to say a few words about the practice in this class of business. Lloyd's underwriters are in the habit of forming what are called syndicates, and the individual member of a syndicate is known as a "Name." These syndicates employ an agent to do the actual business of underwriting on their behalf. The members of a syndicate are careful to assert that their joint adventure is not a partnership. In taking up that attitude they no doubt have in mind the provisions of the Companies Act which prohibits large partnerships; but the fact that they do not regard them as partnerships necessarily involves a certain amount of complication in working out the terms of agreements such as those which we have here.

The practice apparently is, and it certainly is in this case, for the underwriting agents, namely, the Respondent Company, to enter into a series or group of contracts, all in the same form, with each member of a syndicate. Each of these agreements is a separate agreement; there is not one comprehensive syndicate agreement as there might have been if the syndicate were to be treated as a partnership. The way it is done is by having a separate agreement made with each Name and the agent then writes the policy on behalf of all the members of the syndicate who have made the contracts with it. That state of affairs has some little bearing on the question which we have to decide.

The next matter which must be borne in mind is that the profits of underwriting at Lloyd's are ascertained in a special manner. Each underwriting year, which extends from 1st January to 31st December, is treated by itself and the profits of the underwriter are ascertained by reference to the results of each year. The policies underwritten in a particular year give rise to various consequential matters which can only be finally wound up and concluded after a considerable period of time. Claims have to be settled and paid; there may be difficult and complicated questions of average which cannot be worked out until after a considerable time; premiums have to be returned, or additional premiums claimed, and so forth. The practice is to treat a year's underwriting as giving rise to business which continued until the end of the second year after the conclusion of the underwriting year; that is to say, underwriting carried out in the year 1 is not finally regarded as wound up until the 31st December in the year 3. At that date the profit in the year's underwriting is struck and the account is wound up. That is the normal course.

In the present case—and I apprehend it is the common practice—the Respondents as underwriting agents for the syndicates for whom they act are entitled under the contracts with their principals to a commission on the profits of each year's underwriting, and, accordingly, in respect of work that they do as agents in the year 1, the commission to which they are entitled is only to be ascertained at the end of the year 3 by reference to the result of the underwriting of the year 1, and during the years 2 and 3, as well as the year 1, the winding up of the underwriting of year 1 involves much work on the part of the agent.

The question before us, to put it more explicitly, is this: Is the commission receivable by the agents under these contracts referable to the year 1, or is it referable to the year 3, that being the year in

(Lord Greene, M.R.)

which it is actually, in practice, received ? It is received, of course, on or shortly after 31st December, and would fall into the financial year ending the following 5th April. The Commissioners, whose decision was affirmed by the learned Judge, took the view put forward by the Respondents that the appropriate year to which these profits were referable was the year of receipt, that is the year 3, and not the year 1 as the Crown contended.

One point may at once be put out of the way, and that is that the Finance Act, 1937, which deals with the particular tax with which we are now concerned, namely, the National Defence Contribution, contains in Paragraph 14 of the Fourth Schedule a special provision in regard to certain types of contracts for apportioning the remuneration over a period of years. I need not read the Paragraph because both sides agree that the contracts now in question do not fall within the ambit of that Paragraph. There is, therefore, no question raised before us as to apportioning this commission over the three years in question. The dispute is between the year 1 and the year 3.

This question, in my opinion, turns entirely upon the true construction of the relevant agreements; and, expressed in terms of that question of construction, what we have to ask ourselves is this: Is the commission earned in the underwriting year, that is to say, year 1, or is it not earned until the expiry of the years 2 and 3 ? If the latter be the true view, it is not disputed that the Respondents would be in the right in this controversy. On the other hand, if the true view be that the commission is earned in the underwriting year, that is the year 1, in spite of the fact that the amount of it is not ascertained and paid until the accounts are closed at the end of the year 3, again, I understand, it is not disputed that the Crown must succeed.

The question, therefore, is: When is the commission earned ? We have before us two types of contract. In one of them, in addition to the commission, a fixed salary is payable; in the other the only form of remuneration consists of the commission. I will take the former as being the more convenient one to examine at this stage. As I have said, it is a form of agreement made between the Respondents and an individual Name, one of the many Names which make up the syndicate. It is apparent on the face of the document that the Name who is a party to this form of agreement is to be, if he is not already, a member of a syndicate at Lloyd's. That, therefore, is one of the circumstances that we have to know in order that we may construe this document. Also in clause 13 there is a statement that all members of the syndicate have entered, or shall enter into, agreements with the Company in similar form. The drafting difficulties which arise from the fact that these syndicates are not regarded as partnerships stand out very clearly on the face of this document; and it is necessary, I think, in approaching it to bear in mind that the draftsman had to provide for a number of rather troublesome possibilities in a way which would not have been necessary if the contract had been a contract between a partnership and the Company. One possibility was that an individual Name might wish to determine his individual contract, leaving all the other contracts unaffected. Some curious results might follow from that state of affairs. There was also the possibility that all the Names might

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wish to terminate the agreement simultaneously. The draftsman had to have that in mind too. Then there was the possibility that a Name might die while the contracts with the other Names were continuing, and, as all the Names are interests in each policy, obvious complications might arise if one of the Names dropped out leaving the other Names in. I shall refer again to that in a moment when I come to look at some of the individual clauses, but I think it is difficult to understand a lot of things in this agreement unless one realises the sort of difficulties the draftsman had to have in mind in working out this very peculiar relationship.

I will now examine the document itself. In clause 1 the Name retains and authorises the Company to act as the agent for the Name for the purpose of underwriting at Lloyd's all policies of insurance, of a kind to be specified in the agreement, as the Company in its discretion thinks fit, and to carry on the ordinary business of underwriter in his name and on his account. That is a perfectly comprehensive appointment of the Company as agent for the Name for carrying on the business of underwriting, and that includes, of course, not merely the underwriting of policies but also the carrying out and performance of the contract of assurance so made, and all the ancillary operations connected with it, some of which I mentioned earlier in this judgment.

Then come some clauses which elaborate that, although they do not really, so far as the scope of the agency is concerned, I think, extend it; for instance, clause 2 gives the Company "the sole con-"trol and management of the underwriting and all risks shall be "taken and all claims settled by them at their sole discretion in the "name and on account of the Underwriter", and so on. That is merely an elaboration of what was already comprised in the general comprehensive agency created by clause 1.

Then there is a number of provisions as to account, and so forth, and the next paragraph to which I need refer is paragraph 8, which provides as follows: "The Underwriter shall pay to the Com-"pany as remuneration for its services in conducting the agency a "fixed salary at the rate of (blank) pounds per annum and (blank) "pounds expenses for (blank) share and a commission of (blank) "per cent. on the net profits on each year's underwriting". What is meant by "the net profits on each year's underwriting" is to be ascertained from clause 10; that provides that an account shall be kept for each year ending 31st December, and each year the account is to have credited and debited to it receipts and payments in respect of the policies underwritten in the year; and the account is to be "made up and balanced at the end of the second clear year from the "expiration of the period or year to which it relates"—that is what I have called year 3—"and the amount then remaining to the credit "of the account shall be taken to represent the amount of the net "profit of the period or year to which it relates and the commission "payable to the Company shall be calculated and paid thereon". Then there is a proviso "that for the purpose of ascertaining the commis-"sion payable to the Company the account for each period or year "shall be treated as a separate account and the profits of any one "period or year shall not be affected by the result of the underwriting "done in any other period or year."

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There, on the face of that clause, the results of an underwriting year are described as the profits of that year, and it is on the net profits on each year's underwriting that the commission is to be calcultated under clause 8.

It is said on behalf of the Company that the commission is not earned until the whole of the work connected with a year's underwriting is completed and wound up at the end of the third year. Until that time arrives, it is said, the Company has not earned its commission. For the Crown, on the other hand, it is said that the commission is a yearly remuneration earned by the work done in each particular year but ascertainable in point of quantity only at the end of the third year when the account is closed.

Taking these two clauses by themselves for the moment, it is, I think, worth pointing out that the language used suggests, and to my mind strongly suggests, that the Company's view is incorrect. The description of the commission is a commission on the net profits on each year's underwriting, those being the profits of the year 1 and not the profits of the years 1, 2 and 3. It is by reference to what are called the profits of the year 1 that the commission is payable. Although that by itself might not be sufficient to decide this matter, it certainly suggests that that is going to turn out to be the true view.

One other point may be made upon this. Taking the contract which provides for a fixed salary as well as a commission, it is unquestionable that the fixed salary is a yearly salary earned by the work done in each year. It would be a curious result if the additional salary payable by way of commission was not paid in respect of the work done in a year but was paid in respect of work done in a group of three successive years, because that is what the Company's argument would lead to.

However, those are merely prefatory observations. The matter, to my mind, is put beyond doubt when the rest of the agreement is considered. I am going to turn straight away to a later clause, namely, clause 14. In clause 14 either of the parties may terminate the agency on the 31st December of a stated year—that is the first year of the agency, I suppose—or on the 31st of December of any succeeding year by giving to the other party six months' previous notice in writing of his or its intention to do so. There is no clause in the contract which imposes on the Company the obligation to wind up the underwriting business relating to years whose accounts have not been closed. If, for instance, notice to terminate is given at the end of the year 3, so that the agency comes to an end at the end of the year 3, by that time the work will have been completed in respect of the year 1 but the underwriting will not have been wound up in connection with the year 2 or the year 3. By the end of the year 3 there will still be a lot of work to be done.

Now, say the Company, in order to earn our commission we have got to do that work. If we do not do it we have not earned our commission. The result is a curious one, because if the matter stood there it is quite obvious that the Company never could earn any commission in respect of the last two years of the agency.

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An attempt was made at one stage of the argument to say that there was some sort of implied obligation on the Company, if the agency was determined, to complete the work of the underwriting of the years 2 and 3. That, in my opinion, is wholly inadmissible. It is directly in conflict with the phrase in clause 14, "may terminate the agency". If the agency is terminated, it is terminated. The authority of the agent to act for the principal comes to an end there and then; and to imply that the authority continues after the termination is, to my mind, quite impossible without quite clear language showing that that is to be the case. To say that you have to imply it in order to enable the agent to earn his commission, so far from being persuasive in favour of the Company, appears to me to be an argument which exposes the barrenness of the land.

As I have said the contract might be terminated by notice by one underwriter alone; that would terminate a specific contract; or all the underwriters might decide that they wanted to change the agency and they might all terminate it at the same day. If the latter case be taken as the simpler case, it would follow that not one penny of commission could be demanded by the Company in respect of the last two years' work. In those last two years they would have written the policies of the year 2 and the year 3 with all the skill that this requires; they would have done, no doubt, a good deal of work in respect of the policies written in the year 3, but they would probably have done even more work in connection with the policies written in the year 2, on which the claims would have been maturing in the year 3, or some of them. Therefore, there would be that large quantity of work for which they could never hope to be rewarded. That seems to be a very curious result and one which, in my opinion, could not have been contemplated. I cannot find any implied obligation, much less an express obligation, on the Company to carry out and wind up the underwriting for the years 2 and 3 in order to earn their commission or for any other purpose.

That leads me now to turn back to clause 9, which is a curious clause but, to my mind, the meaning of it is not obscure. It is as follows: "The said fixed salary and expenses shall cease at the "termination of the agency but after such termination (whether by "death of the Underwriter or otherwise) the Company shall be "entitled to wind up the underwriting and the accounts in con-"nection therewith and shall be paid for its services in connection "therewith a remuneration of not less than One hundred guineas". Now let me take, first of all, the simple case where all the Names give notice to terminate the agencies on the same day, and let me see what will happen. The fixed salary comes to an end and, apart from the concluding paragraph—the option given to the Company—the agency would be terminated once and for all. The authority of the Company to act for the members of the syndicate would be stopped and, according to the argument, the right to commission for the last two years would never arise. But it is to meet the possibility of the contract being put an end to that this option, entitling the Company to wind up the underwriting and the accounts in connection therewith, is inserted, and, to my mind, it affords a conclusive argument against the Company's present contention.

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It is quite obvious, if the Crown's view be right and the Company earns its commission by the end of the underwriting year, then, if the agency is determined before the business of winding up that year's underwriting is completed, the Company would stand, apart from special provisions, in a very unsatisfactory position, because, the agency having been determined, it would be competent to the underwriters to appoint another agent and that agent might, through ignorance or lack of skill, carry out the task of winding up the underwriting in a way which would seriously affect the profits, and, by affecting the profits, of course affect the commission. Unless the Company was entitled, notwithstanding the determination of the agency, to insist on winding up the outstanding business itself, and so keep the matter in its own hands, the commission which, according to the argument, it has already earned, would be in peril. That is, in my opinion, the sole object of this clause. It cannot be construed, in my opinion, as having been inserted to enable the Company to put itself in a position to earn a commission which it had not yet earned. If the view of the Company is right, on the determination of the agency at the end of year 3 the agent gets no commission for his work in respect of the underwriting of the years 2 and 3 unless he carries that to completion.

It would, to my mind, be a most curious thing to provide that in that case the Company should have an option merely to wind up the business, because it is the winding up of the business, according to the argument, which is going to produce the right to the commission. It is more sensible and intelligible, to my mind, to attribute the insertion of this clause not to a desire to enable the Company to earn a commission to which it would not otherwise be entitled, but to the intention to enable the Company to protect itself against the amount of its commission being affected by the introduction after the termination of the agency of an incompetent successor in the agency for the purpose of winding up outstanding business.

It is, again, quite natural in those circumstances that the Company, if it exercises that option, should receive something to take the place of the fixed salary, for this reason. The work it will be doing in winding up the underwriting business done in the year 2 and in the year 3 will be precisely the same work that it would have been doing in respect of those years if the agreement had never been determined. The only difference between its work after the agency is determined and its work before would be that it would not actually be underwriting any policies after the end of the year 3, when the agency is determined; so far as winding up outstanding business is concerned, it would be doing precisely the same type of work, and that is the reason, I venture to think, why the fixed salary, which has disappeared on the termination of the agency, is replaced by a fee of one hundred guineas minimum.

One more word I must say about the language of clause 9. It provides that the fixed salary and expenses shall cease at the termination of the agency. It says nothing about commission. That seems to me to be perfectly simple to understand. If they had said: "The said fixed salary and expenses and commission shall "cease", it might very well happen that somebody would say: No

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commission is payable in respect of those underwriting years which will only have their results ascertained after the termination of the agency. The only thing which it was necessary to stop was the running of the fixed salary and expenses. A reference to "commission" there would have been entirely inappropriate and confusing. It may, of course, be that, if a notice was served by one single underwriter, or if the agency for one underwriter was determined by his death, there would be certain additional things which the Company would have to do in the way of keeping separate accounts, and so forth, or something might arise under clause 13, which I need not trouble to read, which would involve some extra work and that work it would have to do, but the main work which is contemplated under this option in clause 9 is, in my opinion, the winding up of the outstanding underwriting business.

Some discussion took place as to the meaning of the words "wind up". It was, I think, at one time suggested that it did not refer to the completion of outstanding underwriting business. I do not at all agree with that. The phrase "wind up" is only found in one other place in the agreement, and that is in clause 12, which contains a special provision for a particular set of circumstances; but the actual phrase used is this: "the account may at "the discretion of the Company remain open until all risks have "run off and the business shall have been completely wound up." In that context the phrase "winding up of the business" clearly refers to the complete winding up of the entire underwriting business in respect of a particular year. In my view the phrase "wind up the underwriting and the accounts in connection there-"with" in clause 9 has precisely the same signification.

The only other clause to which I should refer is, I think, clause 12. I refer to it because some discussion turned upon it, but to my mind it is quite easy of construction. It will be remembered under clause 10 the normal way of dealing with the profits of an underwriting year was to ascertain them at the end of the year 3. The account of the year 1 is then closed, and, if there is anything outstanding in respect of the year 1, such as an additional premium to be collected or rebates to be made or possibly part of some outstanding claim to be paid, that is carried over into the underwriting account of the year 2. Year 1 is regarded conventionally as closed, as in the normal case it would be for all practical purposes, I suppose, at the end of the year 3. It is at that date that the profit is struck. Clause 12 provides for that: "In the event of "any transaction relating to the underwriting carried on in any "period or year being left outstanding when the account for such "period or year is made up and balanced any payments or re-"ceipts which may afterwards result from such transactions shall "be carried to the debit or credit as the case may be of the account "for the next year as if the transactions giving rise thereto had "occurred in that year". That provides for the carry forward of any outstanding items, but there is a proviso attached to it. When the agency is determined, if all the Names determine it, quite plainly there cannot be any question of carrying over outstanding items to the next year, because there will not be any next year to be completed, and the Company is, accordingly, given an option by the proviso at the end of clause 12: "Provided always that in

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"the event of the termination of this Agreement the account may "at the discretion of the Company remain open until all risks have "run off and the business shall have been completely wound up." What that means, I apprehend, is this, that although the normal rule is that the account shall be struck at the end of year 3 and any outstanding items carried forward, if the agreement is brought to an end, the Company is to be entitled to say: No, we want to depart from that, we want to have the account for the underwriting of year 1, or whatever it is, run off and completely run off; it may take two, three, four or five years to do it, but we want that to run off. In some circumstances, obviously it would be to the advantage of the Company if that course was taken. In other cases it might not. The Company is, therefore, given an option to select the method of dealing with the matter which suits it best. If it does not exercise the option, then the account is closed at the end of the year 3 and the outstanding items do not come in in ascertaining the profits of that year. I do not get any help from, any more than I find any difficulty in, clause 12, save to the extent that I do get help from the use of the phrase "wound up" in clause 12 when I come to construe the same phrase in clause 9.

I have taken as my illustration of the way some of these things will work out the case where all the Names in the syndicate give notice simultaneously. That, of course, may not happen. One underwriter may give notice; he may have decided to retire from underwriting altogether and gives notice to terminate the agency. That might give rise to a very peculiar legal position in view of the circumstance that the syndicate is not a partnership and there is not one comprehensive agreement. The result apparently would be, if there was a syndicate of twelve Names and one of them put an end to the agency, that the Company would still be the underwriting agent of the other eleven Names and would not be the agent of the twelfth Name who has terminated the agency. There are not twelve policies but there is one policy. What is going to be the authority of the agent to wind up the business in connection with that policy? Is it to be said—I do not endeavour to find an answer to this question—that he has authority to settle claims under that policy to the extent of the interests of the other eleven and not in regard to the interest of the one who has retired? All sorts of questions might arise as to the authority of the agent to act in those circumstances and the extent to which he properly could act in connection with a particular piece of insurance business. Any difficulty of that sort can easily be got round by the operation of clause 9. In the case supposed the Company could easily solve the difficulties by saying: We exercise our option to wind up the business of you, the retiring Name; and they would be entitled to do it. That would mean, not only on behalf of the other Names whose contracts have not been terminated, but on account of the Name whose contract has been terminated they would have an equal and a corresponding authority to wind up the underwriting business. The whole thing, therefore, would work, and, to my mind, the device of that option which has been inserted by the draftsman is apt to get round, and affords a way of getting round, some of the curious difficulties which may arise from the remark-

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able nature of the relationship of the members of the syndicate one to another and to the underwriting agents.

The conclusion I have come to is that, on the true construction of these contracts, the commission is earned year by year, and, on the termination of the contract, the agent is entitled to claim his commission for all the years during which the contract is running down to the last year, notwithstanding he is under no obligation to wind up the outstanding business of the last two years; that he is entitled, if he so chooses, to insist on winding up that outstanding business for the reasons I have mentioned, namely, that it is the best way of protecting himself against the amount of his commission being affected by an incompetent successor.

That, in my opinion, is the whole matter. I make one general observation in conclusion: that this is not a series of yearly contracts, it is one running agency contract. The argument put forward on behalf of the Company really seems to me to treat this as a series of contracts, a separate contract in respect of each underwriting year, which is only completed by the agent when he has done all the work referable to that year. I cannot find any justification for so treating these contracts. They create one single contract of agency, which runs on from year to year, and the type of work that is being conducted in any given year is a mixed type of work, consisting, first of all, of underwriting policies for that underwriting year; secondly, in doing any consequential business which happens to arise in the underwriting year in respect of policies so written; thirdly, in dealing with and carrying out the business consequential on the policies written in the previous year and in the year before that. Therefore it is a mixed and composite type of business, which relates to three different years, so that in each year the agent is doing work referable to three different years. In my opinion the remuneration he receives for the work he does in any particular year is calculated by reference to the commission earned on policies and profits referable to that underwriting year. That appears to me to make a sensible and coherent scheme, and, in my opinion, the appeal must be allowed.

MacKinnon, L.J.—I agree. Under clause 8 of this agreement the Company is promised a certain remuneration by way of commission. The question between the parties is whether that remuneration by way of commission is earned in what my Lord has spoken of as the first year, though the amount of it is only ascertainable at the end of the third year, or is it earned, as the Respondents say, only at the end of the third year as remuneration for work done during the first, second and third years.

I agree that the question depends upon the construction of this agreement, and upon the construction of this agreement I think the first view, that put forward by the Appellants, is clearly the right one. Clause 8 provides that: "The Underwriter shall pay to "the Company as remuneration for its services ... a fixed salary", at so much per annum and so much for expenses, "and a commis- "sion of (blank) per cent. on the net profits on each year's under- "writing". *Prima facie* the "year" in "each year's underwriting" would be the same as the year referred to in the words "per "annum" above. But further illumination as to what is meant by

(MacKinnon, L.J.)

"each year's underwriting" is to be derived from the provisions in clause 10. That provides for the taking of an account at the end of the third year and the ascertainment of the amount of profits, "and the amount then remaining to the credit of the account shall "be taken to represent the amount of the net profit of the period "or year to which it relates". That seems to me to be a clear reference back to the words "net profits on each year's underwrit-"ing" in clause 8.

Therefore, though the ascertainment of the amount has to be postponed pursuant to clause 10, when it is ascertained it is not remuneration earned at the end of the third year for work done in the first, second and third years, but is the ascertained amount of that which is provided for in clause 8, namely, the profits on each year's underwriting; that is, the first year's underwriting.

I also agree that this conclusion is strongly supported by the provisions of clause 9. That provides that on the termination of the agency the fixed salary and expenses shall cease, but nothing is said as to the commission. If the commission is to be remuneration for work to be done in the second and third year, one would expect some provision to be made about it. But none is made. Why not? As it seems to me, because it is unnecessary to say anything about commission; that has already been earned at the conclusion of the first year. It is true that the ascertainment of the amount of that already earned commission has to be postponed for a further two years until the event can show what is its amount, but it is unnecessary to provide that commission shall continue which has already been earned. So, logically, the Company, being under no duty to do any further work to earn their commission, have no duty to go on doing the sort of work they would have done if the agreement had not been terminated. But the proper and economical settlement of claims may affect the amount of their commission, which has not yet been ascertained; therefore it is provided that, notwithstanding the termination of the agreement and the earning of a commission which has been concluded, they shall be entitled to go on settling claims and dealing with outstanding business in order to secure that the ascertainment of the amount of the already earned commission may be favourable to themselves. There, again, I find support for the conclusion I have already expressed, that the commission is earned at the end of the first year's underwriting though the ascertainment of its amount is postponed till the end of the third year.

There are, and I referred to them during the course of the argument, some aspects of this agreement which are novel to me and which I conceive provide the microbe for a considerable amount of dispute and litigation. It is not expressed in the agreement, but it is found in the Stated Case, that the Company's business consists of two parts, that of insurance brokers and of underwriting agents; they enter into these agreements as underwriting agents, and by clause 2 they are authorised, and it is their duty, that all claims shall be settled by them at their sole discretion. It is specially provided in clause 17 that they may underwrite any policy which they may be instructed to effect as brokers. When one reflects that their duty to their client, as brokers in effecting a policy, is to effect it at the lowest possible premium, whereas their duty to

these underwriters, and their interest in the resulting commission, is to effect it at the highest possible premium; and when one reflects that in making claims as brokers upon the policy their duty to their client is to make the claim as high as possible, whereas their duty to the underwriters, and their interest by reason of their commission agreement, is to reduce the claim as low as possible, it is apparent that these conflicting duties can only be carried out by the exercise of an extraordinary delicacy and discretion. The underwriter principals are fully apprised of this duplication of duty and interest in their agents by clause 17 of the agreement. I hope that the clients of the brokers are always equally illuminated as to the duplication of duty and interest in their agents. This is not, I think, the place to enlarge upon those aspects of the form of this agreement, but they do strike me as providing matters which in other forms of litigation may result in awkward questions.

I agree that the appeal succeeds and should be allowed with costs.

Tucker, L.J.—I agree. The question in this case turns entirely upon the proper construction to be put upon these two agreements. The agreements have been so fully dealt with and the Master of the Rolls has so exhaustively explained the interpretation which he thinks is a proper one to be put upon these agreements, that I do not think I can usefully add anything by way of explaining why I have arrived at the same conclusion.

I do, however, desire to say this. Assuming Mr. King's argument to be correct and that it cannot be said that this commission is a profit arising from a trade or business in the first chargeable accounting period, because, as I understand he contends, it was being earned and was accruing throughout the three-year period—if that argument is correct, I think it possible (I say no more) that it might be necessary to consider whether or not Paragraph 14 of the Fourth Schedule of the 1937 Act might be applicable. For the reasons already stated I agree that this appeal succeeds.

Mr. Jenkins.—Would your Lordships allow the appeal with costs here and below and remit to the Special Commissioners to adjust the assessment in accordance with your Lordships' decision ?

Lord Greene, M.R.—There is an adjustment wanted, is there ?

Mr. Jenkins.—The assessment was discharged, and I think the case has to go back to the Special Commissioners with some direction to put it back. I think that is the usual course that is adopted.

Lord Greene, M.R.—Send it back to the Special Commissioners ?

Mr. Jenkins.—Yes, to adjust the assessment for the chargeable accounting period in accordance with your Lordships' decision.

Lord Greene, M.R.—That will be right, will it not, Mr. King ?

Mr. King.—I think the Special Commissioners would act normally to give effect to your Lordships' judgment.

Lord Greene, M.R.—Very well.

Mr. King.—I have to ask your Lordships, should the Company on consideration be so advised, for leave to appeal in this case. It is of some importance. There has been a difference in judicial opinion

(Mr. King.)

as to the case. It goes not only to the National Defence Contribution but it goes to Income Tax and, it may be, to Excess Profits Tax.

(*The Court conferred.*)

Lord Greene, M.R.—Have you anything to say upon this, Mr. Jenkins ?

Mr. Jenkins.—If my learned friend's clients want leave to take the case further, I do not think the Crown can object.

Lord Greene, M.R.—Yes, Mr. King, you may take leave.

Mr. King.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Wright, Porter, Simonds and Normand) on 6th, 7th, 20th, 21st, 24th and 25th February, 1947, when judgment was reserved. On 1st April, 1947, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. H. U. Willink, K.C., and Mr. J. S. Scrimgeour, K.C., appeared as Counsel for the Company, and Mr. D. L. Jenkins, K.C., and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon.—My Lords, this is an appeal from an Order of the Court of Appeal (Lord Greene, M.R., and MacKinnon and Tucker, L.JJ.), whereby an appeal by the Respondents against an Order made by Macnaghten, J., was allowed. The matter arose upon a Case stated by the Special Commissioners, who had decided against the Crown, and the learned Judge had taken the same view.

The problem to be solved is: In what year is remuneration by way of commission, arising under agreements for the Appellant Company's employment in the business of underwriter's agent at Lloyd's, to be brought in for the calculation of their profits chargeable under National Defence Contribution ?

National Defence Contribution was imposed by Section 19 of the Finance Act, 1937, the charge (of five per cent. in the case of a company and of four per cent. in other cases) being on profits arising in each chargeable accounting period falling within the five years beginning on 1st April, 1937. By Section 20 of the Act these profits were to be separately computed, but were to be computed "on income "tax principles" as adapted by the Fourth Schedule, and one of these adaptations was that the profits were to be taken to be the actual profits arising in the chargeable accounting period and were not to be computed by reference to any other period—whereas profits computed for Income Tax under Schedule D are arrived at by reference to the figures of the previous year.

The Appellant Company's profit and loss account for the year ending 31st March, 1939, brought in on the receipts side a figure of £1,728, being the amount of commission actually paid to it in that year. The similar account for the year ending 31st March, 1941, brought in a corresponding figure of £21,995. The question is whether

(Viscount Simon.)

this latter and larger figure, though paid two years later, is properly to be regarded as entering into the calculation of the Appellant Company's profits in the earlier year. An additional assessment was made on the Appellant Company in the sum of £18,678 (the adjusted difference between the two sums above) for the chargeable accounting period 1st April, 1938, to 31st March, 1939, in respect of profits alleged to have arisen in that year, and this additional assessment is challenged by the Appellant Company.

The first thing to be decided is the proper construction of the written agreement between the Appellant Company and its employer, who is one of the Names in an underwriting syndicate making insurances at Lloyd's. A specimen agreement, which is annexed to the Case, recites that the underwriter "is desirous that the Company "should act as his Agent for the purpose of underwriting business" and in clause 1 binds the Company "to act . . . as the Underwriter's "Agent for the purpose of underwriting at Lloyd's all such policies of "insurance . . . as the Company in their discretion thinks fit and to "carry on the ordinary business of underwriter there in his name and "on his account." Clause 2 stipulates that "The Company shall have "the sole control and management of the underwriting and all risks "shall be taken and all claims settled by them at their sole discretion "in the name and on account of the Underwriter and the Company "shall be at liberty to reinsure the whole or a portion of any risk ". . . whenever they think fit."

The clauses next following deal with the keeping of accounts, and then in clause 8 the remuneration of the Company is provided for as follows: "8. The Underwriter shall pay to the Company as re-"muneration for its services in conducting the agency a fixed salary "at the rate of pounds per annum and pounds ex-"penses for share" (i.e., the fractional share of the contracting Name in the syndicate's underwriting business conducted by the Company) "and a commission of per cent. on the net profits "on each year's underwriting", etc. In another specimen agreement also annexed to the Case the element of remuneration by fixed salary is omitted, but this is immaterial, for the question to be decided is as to the proper treatment of commission.

Clause 10 of the agreement provides how the commission is to be arrived at, and when it is to be paid. It runs thus: "10. An "account shall be kept for the period ending the Thirty-first day of "December One thousand nine hundred and and for each sub-"sequent year of the agency and all premiums salvages re-insurance "recoveries and other receipts and all losses averages returns of "premium and other payments and outgoings including cost of re-"insurance if any of outstanding liability in respect of the under-"writing carried on during each such period or year shall be carried "to the account for such period or year and each such account shall "be made up and balanced at the end of the second clear year from "the expiration of the period or year to which it relates and the "amount then remaining to the credit of the account shall be taken "to represent the amount of the net profit of the period or year to "which it relates and the commission payable to the Company shall "be calculated and paid thereon Provided always that for the purpose "of ascertaining the commission payable to the Company the account "for each period or year shall be treated as a separate account and

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"the profits of any one period or year shall not be affected by the "result of the underwriting done in any other period or year."

The agreement manifestly contemplates (and this is the ordinary practice at Lloyd's) that, in the normal course, the employment created by it will last over a number of years, though clause 14 provides for a termination of the agency by either side by six months' notice ending at 31st December. The Appellant Company does not discharge all its duties in reference to a given transaction of insurance by merely underwriting the risk and receiving the premium; it has to follow the transaction through to the end, which may involve modifications of premium and reinsurance of risk, as well as possible questions of average and payment of losses—matters which it is contemplated may occupy the attention of the agent for as much as two years after the year in which the risk was underwritten. (I can omit reference to clause 12, which provides for what is to be done if anything is left outstanding after the two years have expired.) Hence the net profits resulting from a year's underwriting are not ascertained, and cannot be ascertained, till two years later. It is only then that the figure of profit for the year is known, and only then that the commission on that profit is calculated and paid.

So far, as I understand, there is no dispute. But the difficult question remains: For what service is this commission paid? If we assume that five successive years are denoted by 1, 2, 3, 4 and 5, is the commission which is calculated and paid at the end of the year 5 paid as remuneration for the agent's services in underwriting risks in the year 3, together with his services in looking after the outcome of these risks in the years 3, 4 and 5 (as the Appellants contend), or is it paid for the total services of the agent in year 3, which consists of underwriting in that year and of looking after the outcome of risks already underwritten in the years 1 and 2 (as the Respondents contend)? If the former is the correct view, the services which earn the commission will not be completely performed in the year 3 and, as the Crown is not suggesting any apportionment, the Appellant Company will succeed in this appeal. If, however, the commission, though calculated in part on future outcome and payable later, is remuneration for services completely performed in year 3, the Respondents' claim to the additional assessment in respect of the year 3 is justified, as the Appellant Company on this view has at the end of the year 3 done everything it has to do to earn it.

The agreement has been acutely analysed from both sides, with special reference to the complications arising under clauses 9 and 12 if and when the agreement is terminated. I will not retail these arguments; but will content myself with saying that I agree with the rest of your Lordships, to whose opinions I would refer, and with the Master of the Rolls, that the better view is that the commission, though ascertained by reference to profits arising from underwriting in the year 1938-39 and its subsequent outcome and paid two years later, e.g., in March, 1941, is remuneration for work done, and completely done, in the year ending 31st March, 1939.

All that remains is to apply the law correctly to the situation thus established. For the purpose of National Defence Contribution the Appellant Company's profits arising in the chargeable accounting period 1st April, 1938, to 31st March, 1939, are to be calculated "on

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"income tax principles", but they are to be taken to be the actual profits arising within that period. In calculating the taxable profit of a business on Income Tax principles (and the same point has been constantly illustrated in calculating Excess Profits Duty—Volume 12 of Tax Cases contains a number of examples) services completely rendered or goods supplied, which are not to be paid for till a subsequent year, cannot, generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to Income Tax under Schedule D the net result of the transaction, setting expenses on the one side and a figure for remuneration on the other side, ought to appear (as it would appear in a proper system of accountancy) in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered. (I am not speaking of the proper treatment of "work in progress" where the whole subject-matter has to be spread over more than one year—compare Paragraph 14 of the Fourth Schedule to the Finance Act, 1937.) This may involve, in some instances, an estimate of what the future remuneration will amount to (and in theory, though not usually in practice, a discounting of the amount to be paid in the future), but in the present case the amount of the commission due to be paid on 31st March, 1941, as part of the remuneration for services rendered two years before was already known before the additional assessment was made. The Crown is right in treating this additional sum as earned in the chargeable accounting period 1st April, 1938, to 31st March, 1939. If the accounts for this last-mentioned period were made up before the amount of the commission was ascertained, a provisional estimate of what the amount would be might be inserted in the first place and could be corrected, when the precise figure was known, by additional assessment or by a return of any excess within six years of the original assessment.

This, as it seems to me, is the result of applying the well-known decision in the *Woolcombers'* case (*Isaac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue*), 12 T.C. 768, where the taxpayer had been engaged in combing wool on commission for the Government in the year 1917-18 and the commission was by a subsequent arrangement increased and paid to the taxpayer after the end of the trading year. Rowlatt, J., held that the total amount of commission must be included in arriving at the profits of the taxpayer for the year 1917-18. In other words, the taxpayer was treated as earning, by his work in that year, all the profits arising from the business of the year, even though there was no legal right to part of them until the agreement was afterwards made. It will be observed that the Crown's contention in the present case does not go so far as the contention which prevailed in the *Woolcombers'* case, for in the latter there was no legal right, at the time when the work was done, to receive the amount which was ultimately paid; here the Appellant Company had a legal right to be paid *in futuro*. The same principle is involved in the decision of this House in the case of *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927, at page 952. Another illustration of the same principle may be found in the case of *English Dairies, Ltd.* v. *Phillips*, 11 T.C. 597.

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The principle is to refer back to the year in which it was earned, so far as possible, remuneration subsequently received, even though it can only be precisely calculated afterwards.

The decision of this House in *John Cronk & Sons, Ltd.* v. *Harrison*, [1937] A.C. 185 (20 T.C. 612), was referred to as though it qualified, or provided some exception to, the above principle. This can hardly be so, for the line of cases to which I have referred above does not seem to have been referred to at all. The case arose on very special and complicated facts and in substance confirmed the view of the Court of Appeal (Lord Hanworth, M.R., and Romer and Maugham, L.JJ.) that sums which were not received by the taxpayer in the year for which his profits were being calculated should none the less be brought in at a valuation as trading receipts for that year. So far this is in strict accordance with the ordinary principle, but in the House of Lords doubt was expressed as to whether a proper valuation could be made and the Order of the House was that if it could not, the sums, whatever they turned out to be, must be left to be taxed in the year when they were received. I may add that I think that the use of the phrase "actuarial" calculation in that case was a slip, derived from the terms of the Case Stated. At any rate *Cronk's* case does not assist the Appellant Company, for here the actual amount of the commission was known before the additional assessment was made. Even if its ascertainment was not yet possible, it seems to me that a provisional or estimated figure for the commission could be inserted which would be subject to correction either way when the figures were precisely known.

I move that this appeal be dismissed with costs.

Lord Wright.—My Lords, I have considered in print the opinion which has just been delivered by my noble and learned friend Viscount Simon. I agree with it and shall merely state briefly in my own words my reasons for doing so.

The Appellant Company conducts (*inter alia*) the business of agent for the members of various syndicates of underwriters at Lloyd's. Its remuneration consists in a commission on the profits of the particular underwriter on whose behalf the risk is effected, along with, in some cases, a fixed yearly salary during the agency. In computing under Part III of the Finance Act, 1937, its liability for National Defence Contribution under that Act, it is necessary to determine in what year the commission is earned, or, in the language of the Act, in what year the Appellant's profits arose.

The particular problem has arisen in respect of an additional assessment for National Defence Contribution made on the Appellant Company for the accounting period ending on 31st March, 1939. The original assessment had been on the basis of the Appellant's commission in respect of profits from policies underwritten in the year 1936: the additional assessment was on a larger sum representing the Appellant's commission on profit from policies underwritten in the year 1938.

It is necessary, in order to explain this, to state briefly the position of the Appellant as underwriters' agent. Its function is, on behalf of the group or syndicate of Names as principals for whom it acts, to accept risks, issue policies, collect premiums, settle claims, adjust returns of premium or extra premiums, effect reinsurances

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where necessary, and, in short, to conduct the entirety of the underwriting business. The practice of Lloyd's is for underwriting accounts to be drawn up by reference to the calendar year in which the risks are underwritten, but for the accounts to be kept open for a certain time (generally three years) from the acceptance of the risk to allow for the adjustments required in order to ascertain the eventual profits. The delay is necessary in order to close the accounts. There must be an interval of time for ascertaining and settling losses and winding up the financial results of each risk, which will depend on how the risk has worked out. Accordingly accounts are made up in general practice at the end of the second year after the year in which the risk has been underwritten. That period is generally sufficient to ascertain the final results of the venture and to complete the accounts. The dispute in this particular case is whether the profits are to be taken on the basis of the risks underwritten in 1938, the account of which would be drawn up in 1940, or in respect of the risks underwritten in 1936, the account of which was drawn up in the accounting period. The Respondents contend that the former is the correct basis, because they say the commission was earned in that year, though its amount was not ascertainable until the end of the three-year period. The Appellant contends that the latter is the true basis, because, it says, nothing was ascertainable, demandable or payable until the latter date.

I accept that the law on the point is as stated by my noble and learned friend in his judgment. He sums it up in this way: "The "principle is to refer back to the year in which it was earned, so "far as possible, remuneration subsequently received, even though "it can only be precisely calculated afterwards.(1)" I agree also with his comments on the decision of the House in *John Cronk & Sons, Ltd.* v. *Harrison* [1937] A.C. 185 (20 T.C. 612), and his view that that case did not qualify the rules laid down in the earlier cases to which he refers.

With this principle in mind I turn to consider if the profits from the commissions in question, on which the Respondents claim to assess the Appellant Company, were those arising from risks effected in 1938 or in 1936, and for that purpose I must consider the form of agreement in use in the particular transactions in question.

Your Lordships have been supplied with copies of two skeleton agreements. I shall take first the form applicable to the Names in the F. G. Hall and G. Simmons syndicate. Under that skeleton agreement the Appellant Company was vested with full discretion to carry on the ordinary business of underwriters at Lloyd's in the name and on account of a particular member of the syndicate, with full control and management of the underwriting and with full power to take risks and settle claims and to reinsure the whole or any portion of any risk or outstanding liability. The Appellant was to keep proper accounts and keep a separate banking account, and all moneys received were to be held on trust. Clause 8 dealt with remuneration. The Appellant Company was to be paid as remuneration for conducting the agency a fixed salary at the rate of pounds per annum, and expenses, and a commission of per cent. on the net profits on each year's underwriting, and also

(1) *See* page 94 *ante.*

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certain further contributions to outgoings. Clause 9 is particularly significant. It provided that the fixed salary and expenses should cease at the termination of the agency, but after such termination (whether by death of the underwriter or otherwise) the Appellant Company should be entitled to wind up the underwriting and the account in connection therewith and should be paid for its services in connection therewith a remuneration of not less than one hundred guineas. Clause 10 provided for the three-year method of accounting and stipulated that the account for each year should be treated as a separate account for ascertaining the commission and one year should not be affected by another. The accounts for each year were to be made up and balanced at the end of the second clear year after the expiration of the period or year to which it related. Clause 12 contained provisions for dealing with matters left outstanding when the account for the year has been made up and balanced. Clause 13 provided for what was to happen on the death of one member of the syndicate and for his account being taken over or reinsured by the surviving members. Clause 14 gave an option to either party to terminate the agency at the end of any year on giving six months' notice. Clause 15 provided that nothing in the agreement should be taken to constitute a partnership.

It is on the provisions of the contract that it must be decided, as a question of construction and therefore of law, when the commission was earned. What I think is the crucial provision is that in clause 9, which deals with what is to happen when the agency is terminated. It expressly stipulates that the fixed salary is to cease. The Appellant Company, however, is to have the option to wind up the underwriting and accounts, and if it exercises that option it is to be entitled to a special remuneration for that work. This is in place of the stipulated annual salary, which ceases with the termination of the agency. But it is not bound to exercise that option, though it may for various reasons suit it to do so. What then is the position if it does not ? The agency is a yearly employment while it lasts. The yearly salary naturally ceases with the agency but the question of commission is not mentioned. I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned, though the profits resulting from the insurance cannot be then ascertained, but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested, though its valuation is postponed, and is not merely postponed but depends on all the contingencies which are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance, and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case, however they may affect the profit, do not affect the right for what it eventually proves to be worth. The right itself in a case like this does not depend on whether the Appellant Company has discharged all its duties as underwriting agent. It is clear that these duties

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are not limited to the simple but decisive act of taking the risk for its principal. The future working out of the insurance may involve, so long as the agency and the authority to act for the same continue, the exercise of discretions, such as settling claims, effecting reinsurances, and many other matters almost as vital as the original taking of the risk. But all these duties are covered, while the agency continues, by the agreed commission together with the yearly salary in addition where that is stipulated for by the agreement.

The Appellant has contended strenuously that the various duties ancillary and subsequent to the writing of the risk are conditions precedent to the earning of the commission. As I have already explained, this view would destroy the right to commission altogether in the event of the agency being terminated, wherever that happens before the underwriting and accounts are wound up. The Company then is no longer agent and its authority to act for the underwriter has ceased. Suppose a risk is written in a particular year of the agency, say year 1, and the agency is terminated in year 2 or year 3, that is, in either of the succeeding years of the 3 years' cycle, the underwriter on that basis would get no commission at all for writing the risks of year 1, because he would not have completed the duties which are said to be conditions precedent to earning the commission, and could not do so because his authority to act for the same would have ceased. That cannot, in my opinion, be regarded as a possible agreement between business men. The only alternative which I can see is to accept the view already stated, that the commission is not referred to specifically in clauses 9, 10, 12, 13 or 14 because it was meant to be treated as something fixed and established and unaffected by the termination of the agency. That will be so not only in the case of the skeleton agreements which I have been so far discussing, namely, those providing for a fixed yearly salary, but equally in the case of the other type of agreement, that in which no fixed salary is agreed but the only remuneration provided for the agent is the commission. This conclusion is not only more in harmony with the true construction of the contract but with the business exigencies of the matter, and also with the general trend of authority embodying the legal principle which has been stated by my noble and learned friend Lord Simon. It may, of course, happen sometimes that a particular risk cannot be closed or wound up at or before the end of the three years' period, but such a case can be dealt with, as it is dealt with in the agreement, by a subsequent reopening and adjustment of the accounts. Nor is it an objection to this view that in these cases the act of accepting the risk does not exhaust the functions of the agent. That aspect, which is not generally present in the cases cited, is perhaps easier to work into the scheme in the type of contract in which there is, besides the commission, a fixed annual salary, which may be taken to cover in conjunction with the commission the general duty of conducting the business. But in the other type of contract, where there is no such fixed annual salary, still the commission must be taken to include a payment for the subsequent activities which the agent has to perform.

I may observe in concluding that no question is raised in the case as to apportionment under Paragraph 14 of the Fourth

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Schedule to the Finance Act, 1937. Indeed such an idea would not square with the contentions of either party. Nor have I found much help in what is called the distinction between the legal and the conventional basis.

I should dismiss the appeal.

Lord Porter (read by Lord Simonds).—My Lords, this case raises a question as to the year in respect of which commission earned by underwriting agents at Lloyd's is subject to charge for the purposes of National Defence Contribution.

The charge was imposed by the Finance Act, 1937, and the operative Sections are 19 and 20. I quote the material portions of these Sections: "19.—(1) There shall be charged, on the profits "arising in each chargeable accounting period falling within the "five years beginning on the first day of April, nineteen hundred and "thirty-seven, from any trade or business to which this section "applies, a tax (to be called the 'national defence contribution') of "an amount equal to five per cent. of those profits in a case where the "trade or business is carried on by a body corporate and four per "cent. of those profits in any other case." "20.—(1) For the pur-"pose of the national defence contribution, the profits arising from "a trade or business in each chargeable accounting period shall be "separately computed, and shall be so computed on income tax "principles as adapted in accordance with the provisions of the "Fourth Schedule to this Act ... (2) For the purpose of the national "defence contribution, the accounting periods of a trade or business "shall be determined as follows:— (*a*) in a case where the accounts "of the trade or business are made up for successive periods of "twelve months, each of those periods shall be an accounting period;" and 20 (2) (*c*): "... and the expression 'chargeable accounting "'period' means—(i) any accounting period determined as aforesaid "which falls wholly within the five years beginning on the first "day of April, nineteen hundred and thirty-seven". Admittedly the Appellant's business is one to which Section 19 applies. The period with which your Lordships are concerned is that beginning on 1st April, 1938, and ending on 31st March, 1939, and the Appellants are accustomed to make up their accounts for successive periods of twelve months beginning on the 1st April and ending on the 31st March in each year. They in fact carry on two separate businesses, viz., that of insurance brokers and that of underwriting agents, but the question at issue is solely concerned with their profits in the latter capacity and their activities as brokers are not in issue.

The Appellants act as agents for more than one syndicate and, in accordance with the ordinary practice of Lloyd's, have a separate agreement in identical terms with the various members of each syndicate, but it does not follow that the contracts are the same in the case of one syndicate as they are in the case of another. Indeed two separate forms of agreement have been exhibited to the Case stated by the Special Commissioners, upon which your Lordships have to pronounce. In substance the terms of each are similar but there are some differences in detail.

In order to become a Name in a syndicate the individual concerned must become an underwriting member of Lloyd's, and for that purpose he must, in conjunction with his fellow Names and the

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underwriting agent, enter into an indenture called a trust deed, under the terms of which all premiums received by the syndicate are to be retained by trustees for the payment of losses and other outgoings, including expenses, and, subject thereto, as profits of the business. The Name must also, as a condition of his admission as an underwriting member of Lloyd's, sign an undertaking as to his method of carrying on business, and this undertaking contains an obligation similar to that found in the trust deed whereby all premiums are to be placed in the hands of trustees for the purposes aforesaid.

The universal practice of Lloyd's is for the underwriting accounts of risks written in any particular year to be separated from those of any other year and to be kept open for a certain time (usually three years) in order that losses and expenses may be calculated and profits ascertained.

Ultimately the decision of the dispute which your Lordships have to determine depends upon the true construction of the agreements between the Appellants and their Names, and for that purpose those agreements must be analytically examined, but for the moment it is sufficient to say that they provide (*inter alia*) for the payment of a commission on the profits of the business by the Names to the Appellants. Inasmuch as it is impossible to find out what losses will occur, what settlements may be made, what increase or return of premiums may be necessary and what reinsurances and other expenses may be involved, the amount of profits upon which the commission is calculated is not and cannot be known until at least the three years during which the accounts are kept open have come to an end.

The result is that the amount of commission due on risks underwritten in the year (say) 1938 is only discoverable three years later, i.e., profits on risks written in the year 1st April, 1938, to 31st March, 1939, are only ascertained at 31st March, 1941. In these conditions the Appellants claim that under the terms of the agreement between them and their Names the commission is not earned until the last-mentioned date, whereas the Respondents maintain that it is earned in the chargeable accounting period 1st April, 1938, to 31st March, 1939.

There is no dispute as to one of the considerations to be applied. Each of the parties accepts the view that the material period is that in which the commission is earned, but disagrees as to what that period is. The Commissioners say that it was earned in the year in which the risks were underwritten, whereas the Company assert that it was not finally earned until April, 1941, and give two reasons in support of their contention, viz., (i) that the work which they had to do in order to earn their commission was not completed until the last-mentioned date, and (ii) that even if their task was completed by April, 1939, still, in consequence of certain authorities decided by and binding upon your Lordships' House, such emoluments could not be said to be earned in law as were unascertained and unascertainable, in the sense that no evaluation of them could be made at the end of the chargeable accounting period and any figure inserted in respect of them into the syndicate's accounts would at best be no more than a guess, since they might amount to anything between a substantial sum and nothing.

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In the Case stating the facts on which the present dispute has to be determined the Special Commissioners have found that it is impossible to ascertain in the initial year what commission would accrue to an agent with regard to risks underwritten in that year; that in the case of disputed claims there was normally as much to do in the second and third years after the risks were underwritten as in the first, and that there was a considerable amount of expert business to be performed by the agent in the latter period in respect of risks written in the earlier year. Further, they found that the underwriters' profits, on which the commission was calculated, depended on events some of which would happen after the end of the year in which the risk was written.

In these circumstances it was contended on behalf of the Appellants that the contracts into which they entered were executory contracts under which their services were not completed or the commission earned until the relevant account was made up. The profit in the form of commission, they said, was not ascertainable or earned, and did not arise, until that time.

It was contended on behalf of the Crown that under the terms of the agreements entered into by the Company their commissions were earned in the respective years in which the policies were underwritten, and that it was immaterial in law that the amounts of the commissions were not ascertained until two years later: the additional assessment to National Defence Contribution for the year 1938-39 had been correctly made in accordance with the law and should be confirmed.

Upon these findings the Commissioners who heard the appeal gave their decision in the following terms: "(1) The underwriter's "profit, on which the agent's commission depends, does not normally "emerge for a considerable time. For this reason Lloyd's under- "writers have adopted the method of accounting, known as 'the "'conventional basis', under which results are brought to profit and "loss account in the second year after the end of the first year, i.e., "that in which the policy is underwritten. The Appellant Company, "in common with other agents, has adopted and consistently em- "ployed the same method. Thus it brought into its account for the "year to 31st March, 1939, the commissions of underwriters' profits, "ascertained in December, 1938, from policies underwritten in 1936. "(2) The present case raises the question what is the proper basis "of liability to National Defence Contribution in the case of the "underwriters' agent, and we are concerned with that question alone. "The answer is not necessarily the same as in the case of the under- "writer, if only because the agent's reward (salary, etc., and com- "mission) is not related in the same way to the undertaking of a "risk in the first year, but is earned by agency services over an "indefinite period. (3) That period normally extends well beyond the "end of the first year, and in the circumstances we do not think the "Crown is right in its contention that the part of the agent's reward "which takes the form of commission is earned in the first year and, "when received, should be related back to that year. (4) The only "alternative put to us was 'the conventional basis' indicated in "paragraph (1) above. The agent's services under his contract may "extend to the end of the second year there referred to, or may be

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"completed at some earlier date. In this respect, therefore, 'the "'conventional basis' does not seem equally appropriate to every "case, even though the commission may not be known till the end "of the underwriters' second year. However it is obviously con- "venient and has the support of accountancy evidence. We see no "good reason for rejecting it and accordingly allow the appeal, and "discharge the additional assessment before us."

On these findings one matter may, I think, be disposed of at once. I understand that the statement, in findings (3) and (4), that no other basis of claim was put forward before the Commissioners except the "conventional basis" on the one hand and the Crown's contention on the other, was made in order to dispose of any argument founded upon Paragraph 14 of the Fourth Schedule to the Act of 1937, which is in the following terms: "14. Where the per- "formance of a contract extends beyond the chargeable accounting "period, there shall (unless the Commissioners of Inland Revenue "owing to any special circumstances otherwise direct) be attributed "to that period such proportion of the entire profit or loss which "has resulted, or which it is estimated will result, from the complete "performance of the contract as is properly attributable to that "period, having regard to the extent to which the contract was "performed in that period."

Under these provisions it might have been possible for the Respondents to maintain that, if they were wrong on the main theses and if the commission was earned by work done in each of the three open, it would then be proper to apportion the commission over each years during which the accounts of the underwriting year were kept of those years in accordance with the terms of this Paragraph, but they have expressly declined to put forward any such contention and the Appellants have equally refrained from relying upon such a claim. In these circumstances your Lordships, like the Commissioners, have to determine whether commission was earned in the year 1938 or at a later date.

The question is a matter of importance. Even in the present case it would add some £18,000 to the profits subject to tax, and I have no doubt that there are a large number of accounts which will be similarly affected.

My Lords, I am conscious of the regard which must be paid to the findings of the Commissioners, which I accept fully, as indeed your Lordships' House is bound to do. Moreover in matters of business and the keeping of business accounts, the practice followed in the particular occupation is always a matter for the most careful thought and cannot lightly be disregarded. Nevertheless these considerations do not absolve your Lordships from a scrutiny of the exact terms of the agreement between the agent and the Names, and from deciding the date at which the commission is earned under its terms.

In substance the Appellants contend that, just as the underwriting done in each year is kept separate from that done in all those preceding or succeeding it, so the work in respect of each must also be kept in a watertight compartment, and consequently the commission in respect of each underwriting period is earned by under-

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taking the risks and following them through until all of them are finally disposed of, subject to some slight overlap, not material to a decision of this case, where an uncompleted transaction may be carried forward into a fourth or even later year. In other words, the work which earns the commission is done not in one year but in three and is not completed until the third year has elapsed. If this is the true construction of the contract, admittedly the Appellants must succeed.

The Respondents on the other hand, whilst they agree that the underwriters' profits are to be ascertained by such a separation of one year from another and that the quantum of commission is to be calculated upon a percentage of those profits, yet say that this is merely a conventional method of discovering what the commission is to be and in no way determinative of the work by which it is earned. For the latter purpose one must look at the terms of the agreement itself.

The clauses in the agency agreement upon which stress was laid in the discussion before the House were numbers 8, 9, 10, 12 and 14, and those clauses do, I think, contain substantially all the provisions upon which your Lordships' decision must depend.

As I have endeavoured to indicate, the Crown say that the commission is earned not by the work done in respect of a particular year's underwriting, but for all the work done in a particular year whether in respect of underwriting done in that year or in the previous two years or indeed in any previous year, whereas the Company say the work done in respect of the risks undertaken in a particular year is to be kept entirely separate from that in respect of the risks undertaken in any other year and that the commission in respect of any individual year is earned by writing the risks in that year and following up the work incidental thereto. In their submission, until that task is fulfilled, which will not be until the end of the third year, the work for which they are being paid commission is not completed or the commission earned.

Bearing in mind these two contentions I turn to the material clauses. To my mind clause 8 stipulates in terms the task for which commission is paid. It is "for its" (i.e., the agent's) "services in "conducting the agency", not for its services in writing a particular year's risks and dealing with the various matters necessary for disposing of them. Moreover, under the terms of that clause the payment of the fixed year's salary is to be made for exactly the same work, and undoubtedly the latter remuneration is for the whole of the work done in that year, not the proportion of it attributable to a particular year's underwriting. It is true that in the case of one of the Appellant's syndicates there is no fixed salary payable, but in that case also the commission is for the Company's services in conducting the agency and without any stipulation that the payment should be for the work done in respect of a particular year's underwriting and that only.

No doubt clause 10 does provide for the separation of the accounts respecting the risks undertaken in one year from those respecting the risks undertaken in any other year, and for separating the profit accruing to the Names in respect of any one year's business

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from the profits accruing in respect of any other year's underwriting, and further provides that commission shall be paid upon the profits so ascertained. But it does not follow that the work by which the commission is earned is that done in respect of the risks underwritten in a particular year. The clause is merely a method of finding out the profits to which the Name is entitled. It "shall *be taken* to "represent the amount of the net profit of the period or year to "which it relates", are the words of the clause (the italics are mine), "and", it goes on, "the commission payable to the Company shall "be calculated and paid thereon". This phraseology means I think, that a conventional sum so calculated shall be regarded as the commission which the agent shall be deemed to have earned in respect of the work which he has done in an individual year. It is, as the proviso says, "for the purpose of ascertaining the commission pay-"able to the Company", and for that purpose the account for each period or year is to be treated as a separate account. The commission is calculated upon, but not earned by doing, that portion of the year's work.

The Appellants, however, say that so to construe the agreement is to confine the attention to part only of its provisions, and indicate certain difficulties in administering the business if such a construction is adopted. They point out that clause 14 provides for the termination of the agreement by either party at the 31st December in any year, and that clause 9 contemplates such a termination either under clause 14 or by reason of the death of the Name.

How, they ask, is the outstanding business to be dealt with in such an event? Clause 9, they agree, entitles but does not compel the Appellants to wind up the business and settle the uncompleted risks. But, it is said, suppose they do not elect to do so. In that event the Name, instead of having the work completed by them, must find some other agent or, if alive and willing to do so, himself wind up the venture, although, as they contend, upon the Respondents' construction he will have to pay for that very work out of the commission due at the end of the third year.

They admit that clause 9 speaks of the termination of the agency and that that expression might in another collocation mean that notice or death would finally bring the relationship between agent and Names to an immediate end, but say that in its association in the agreement "termination" means that, though the mandate to write further risks is ended, yet the obligation to wind up the business is not, but continuous until the further two years have elapsed. How else, they add, could outstanding matters be efficiently dealt with? The Company, it is urged, are under an obligation to complete the work entailed by writing the previous one or two years' risks for the Names who remain, unless the agents themselves go out of business, and the natural assumption and convenience of all parties involves their finishing the work for the retired or deceased Name as well as for those whose membership continues. Moreover, the terms of clause 12 must be considered. That clause provides for the carrying over of an uncompleted account even to the fourth year, and the proviso, in saying that "in the event of the termination of "this Agreement the account may at the discretion of the Company "remain open until all risks have run off and the business shall have

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"been completely wound up", by implication says and means that it will normally remain open until the usual two years' period has elapsed.

My Lords, I hope I have not mis-stated the argument. I am conscious that I have found it elusive. The answer is, I think, that so to construe the agreement is to give its phraseology a meaning which the words used do not naturally bear. To my mind "termination of the agency" or "termination of the agreement" means the same thing, viz., the cessation of all the mutual obligations of either party forthwith. Moreover, the whole method of expression used in clause 9, i.e., the cessation of the right to fixed salary and expenses, the option to wind up the underwriting—not, it is to be noted, to cease future underwriting—and the right to be paid for winding it up, all suggest that "termination" means termination of all future rights and obligations between the parties except the right on the part of the Name to receive his profits when ascertained and that of the agent to receive his commission upon those profits, subject always to the fact that the agent may elect to wind up the affairs of the Name and be paid for doing so. If the obligation to finish all the work consequent on previous underwriting remains, I do not see why the company should be paid for the winding up.

It was sought to overcome this last difficulty by suggesting that winding up in clause 9 refers to any winding up necessitated by carrying over the accounts beyond the two years, and, as I understood the argument, the provisions of clause 12, under which uncompleted accounts were to be carried over and included in the next year's account, and the phrase "completely wound up" in that clause, were relied upon as indicating that the agency did not terminate until after the whole of the work consequent upon underwriting done had been fully disposed of and its results ascertained after two years' interval. I do not myself think that the wording used implied any such result. Those provisions were required for dealing with a continuing agency, they have no necessary application to an agency which has been terminated.

A further argument, however, was strongly relied upon on behalf of the Appellants. It was pointed out that, on the Respondents' construction, the agent is not remunerated for a similar amount of work in respect of each year. If, as the Case finds, a year's underwriting involves an equal amount of work in each of the three years during which its accounts remain open, and if the Name is to pay the full commission in respect of the work done in each year, whatever it may be, then when a new Name joins a syndicate he will pay full commission for the first year, though the agent would only have done one-third of the work which would be required after the account had reached its third year, and in the second only two-thirds of that amount. Consequently, if the agency was terminated after ten years the agent would have completed a volume of work equivalent only to nine times the work necessary in a full year's working, i.e., eight full years' work, one year involving two-thirds of one full year's work and one involving only one-third. No doubt this is in a sense an anomaly, but it is, in my opinion, what the agreement says, and the anomaly does not justify a construction inconsistent with its terms.

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If I am right in my view as to the true construction of the agreement, it only remains to consider the second contention put forward by the Appellants. That contention was modified in the course of the argument before your Lordships. Originally it was said that, though remuneration earned in a particular year is, in general, part of that year's taxable profits even if not ascertained or payable until a later date, nevertheless there is an exception to this rule in a case where that remuneration is not only unascertained but unascertainable. In such a case it was maintained that the remuneration was chargeable to tax in the year in which its existence and amount were first ascertained.

By a later modification the view was accepted that in some cases profits payable at a date outside and beyond the year in which they were earned, even though unascertainable in that year, are chargeable to tax as profits of the earlier year, but not in all. Where, it was said, some remuneration is certain but its quantum is not and cannot be ascertained, still it must be regarded as profits of the year in which it was earned, but where it is uncertain whether there will be any profits at all, then, if any profit is eventually discovered to have been earned, it must be charged to the year in which it is ascertained or paid. No sum, it is contended, could be inserted in the earlier year's accounts in such a case. To credit any sum would not be to make an estimate but to hazard a guess not only as to its quantum, but even as to its existence, and, where one can only guess, the sum eventually found to have been earned must be attributed to the year of payment. In support of this contention three cases were called in aid, viz., *Dailuaine-Talisker Distilleries, Ltd.* v. *Commissioners of Inland Revenue*, 1930 S.C. 878 (15 T.C. 613); *John Cronk & Sons, Ltd.* v. *Harrison*, [1937] A.C. 185 (20 T.C. 612), and *Absalom* v. *Talbot*, [1944] A.C. 204 (26 T.C. 166).

The first case is not binding on your Lordships, and I am not prepared to accept the view that it would necessarily have been decided in the way in which it was, had it been brought before this House. Some of the observations at any rate of the members of the Court of Session cannot, I think, be supported. For instance, the Lord President, quoting from an earlier decision of his own, says, at page 884 (1), "those elements of profit or gain, and those "only, enter into the computation which are earned or ascertained "in the year to which the enquiry refers(2)". Lord Sands also appears to take the view that, though remuneration unascertained at the end of the chargeable period may yet be profits of that period, nevertheless if it is then unascertainable it cannot be regarded as an element in those profits. Lord Blackburn goes, I think, further, and holds that, if the remuneration is not payable until a date beyond the period of charge, it is not to be reckoned as profits of that period.

But the decision itself can be supported in principle. The Lord President says, at page 884: "Thus, if goods have been sold or de-"livered to a customer within the year, the sum due by the customer "is credited to the business and debited to the customer and enters "the profit and loss account at the end of the year, whether pay-"ment in cash (or otherwise) has been received within the year or

(1) 15 T.C., at p. 620.
(2) Edward Collins & Sons, Ltd. *v.* Commissioners of Inland Revenue, 12 T.C. 773, at p. 780.

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"not. But this elementary principle does not necessarily apply to "the price of a contract made during the year (or in a previous "year) but not completed within the year.(1)" If this means that, where the contract is an entire one, the remuneration is not earned until the whole task is completed, I think it accurately expresses the true principle, and it has the support of Lord Morrison who dissented. Indeed it may well be that the only difference between the members of the Court of Session consisted in a divergency of opinion between them as to when the work for which payment was to be made was completed: the majority taking the view that the appellants had undertaken to store whisky for their customers for a period of time and that their charges were not earned nor the work they had to do completed until the whisky was finally removed, though the sum due was calculated on a weekly basis, Lord Morison on the other hand thinking that it was earned week by week. If this be the difference of opinion, there is no divergence in principle, merely two separate views as to the construction of a particular document.

John Cronk & Sons, Ltd. v. *Harrison* (2), [1937] A.C. 185, does undoubtedly give rise to more difficulty, and was strongly relied upon by the Appellants. The principle for which it was cited was asserted to be found towards the end of the decision: "I have serious "doubt", says Lord Thankerton, at page 193 (3), "whether the valua- "tion ordered by the Court of Appeal is practicable in any proper "sense; the Commissioners, after hearing evidence, have expressed "the view that an actuarial valuation is not possible, and it may well "be that no proper valuation is possible. I propose therefore that "the order of the Court of Appeal should be varied by adding that in "the event of the Commissioners finding such valuation to be im- "practicable, the sums deposited with the building society under the "circumstances described in the case stated should not be treated "as receipts of the Company's trade except in so far as sums, "or any part thereof, were released to the Company during the trad- "ing periods in question."

These observations, in the submission of the Appellants, constituted a ruling that in any case where a sum earned *in presenti* and payable *in futuro* is incapable of any computation except by a guess and may in fact have no value, it must be chargeable to tax not in the year in which the work necessary to earn it is performed but in the year in which it is received.

My Lords, I do not think the case lays down any such general proposition. The facts were peculiar. The material parties were a building company which constructed houses for clients, a building society which advanced money to enable the clients to purchase their houses, and the clients themselves. To take the illustration apparently given in the Case Stated, which represented a typical transaction—A house is built and sold for £575: the society nominally advances the whole sum, but actually the builders receive only £501 13*s.* 4*d.*, leaving £73 6*s.* 8*d.* which is called a deposit in the hands of the society and earns interest so long as it is retained. In addition, in case of the client's default the builders are liable to the society for a sum not exceeding £76 13*s.* 4*d.*, i.e., their total liability amounts to £150 in case of default. In these exceptional circum-

(1) 15 T.C., at p. 620. (2) 20 T.C. 612. (3) *Ibid.*, at p. 642.

(Lord Porter.)

stances it may well be said that a new relationship has been established between the society and the company, under which, indeed, if it can be fairly estimated that some sum is due to the latter by the former, the remuneration is regarded as earned though its payment is postponed, but if no estimate can be made the contract between the parties must be regarded as leaving no debt due on one side or the other but only a position in which there are mutual obligations which may as well show a credit to the one party as to the other.

If I may be permitted to quote from my own speech in *Absalom's* case (1): " In it " (i.e., *Cronk's* case(2)), I say, " no debt remained due " from the purchaser to the owner, the full price was paid to the " latter by the building society. But lest the society should not be " repaid by the purchaser in full, the owner deposited a sum of money " with it and guaranteed payment of an additional sum beyond the " deposit. In these circumstances there were contingent liabilities " on each side: in the case of the society to return the deposit or " some part of it, if the money which was recovered from the pur- " chaser enabled this to be done: on the side of the owner to imple- " ment his guarantee if the purchaser failed to pay even so much as " with the deposit made up the full price." And again: " In such a " case there was no debt either present or future due to the Appel- " lant. It might eventually happen that something would be found " to be due to him but, on the other hand, so far from receiving, " he might have to pay."

It is true that in that case my opinion differed from that of the majority of your Lordships who sat to hear the matter, but the difference was only as to the quantum of the sum to be charged, not as to the year to which its gain was to be attributed. All the members of the House who were present were of opinion that the sums agreed to be paid should be assessed to tax in the year in which the house which had been sold was transferred to the purchaser, but the majority thought they should be assessed at a reduced figure, whereas the minority thought the full sum should be the basis of assessment. The decision, therefore, is antagonistic to the Appellant's argument here, and the case itself did not exhibit those exceptional and peculiar features which are to be found in *Cronk's* case.

In my view the cases cited do not establish the principle sought to be deduced from them and, for that reason as well as because I think the sum in dispute in the present case was wholly earned in the year in which the risks were underwritten, I would dismiss the appeal.

Lord Simonds.—My Lords, this is, I think, a very plain case, and it is only in deference to the prolonged and vigorous argument of Counsel for the Appellants that I make a few observations upon it.

Two questions are involved, the first a question of construction of certain agreements made by the Appellants with members of certain syndicates of underwriters at Lloyd's, the second a question of the application of the correct principle of Income Tax law to the case. The impost actually in dispute is the National Defence Con-

(1) 26 T.C. 166, at p. 198. (2) 20 T.C. 612.

tribution, which was imposed by the Finance Act, 1937, but it is common ground that the point at issue is governed by the principles upon which the profits and gains of a trade are determined for Income Tax purposes.

The Appellants, a limited company incorporated in 1902, carry on (*inter alia*) the business of underwriting agents; that is to say, they act as agents for underwriters at Lloyd's, who form themselves into syndicates, the members of which (known as "Names") are insurers of various types of risks. As such agents on behalf of their principals they accept risks, issue policies, collect premiums and settle claims, and do all the other work which appertains to the business of underwriting.

For this purpose the Appellants enter into a separate agreement with each member of a syndicate. The agreements with every member of a syndicate are identical, but in the case of one of the three syndicates with whose members the Appellants entered into agreements, namely, the Carisbrooke syndicate, the Appellants' remuneration was by way of commission and expenses only, whereas in the other two cases a fixed annual salary also was provided.

The universal practice of Lloyd's is for underwriting accounts to be drawn up by reference to the calendar year, but for the accounts to be kept open for a certain time (usually three years) to allow the necessary adjustments to be ascertained and made. This fact, which is dictated by the nature of the business, is reflected in the agreements to which I have referred, and is the cause of the difficulty that has arisen.

I will refer briefly to the salient features of a typical agreement. By clause 1 it provides that the Company (as in this recital I will call the Appellants) agrees and is retained and authorised to act as the underwriter's agent for the purpose of underwriting at Lloyd's all such policies of insurance as the Company thinks fit and to carry on the ordinary business of underwriter there in his name and on his account. Clause 2 elaborates the functions and duties of the Company.

Clause 8 is the vital clause which provides for the Company's remuneration. Under it the underwriter is to pay to the Company (except in the case of members of the Carisbrooke syndicate) a fixed annual salary, a fixed sum for expenses and "a commission of "per cent. on the net profits on each year's underwriting", and is also to make certain other contributions for the benefit of the Company. In the agreements with members of the Carisbrooke syndicate there is no provision for an annual salary, and the provision in regard to expenses is somewhat different, but there is a similar provision in regard to commission.

My Lords, I pause for a moment at this point, for it is the crucial one, to state the question which arises. It is whether, upon the true construction of this clause, the Company earns not only the annual salary, where it is paid, but also the commission on the "net "profits on each year's underwriting" in the year in which the risks are written, or whether that commission is only earned over a period comprising the year of writing and the ensuing years which elapse before the "profits on the year's underwriting" are conventionally ascertained. This clause must no doubt be read in its context,

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but it must first be read by itself, and, if it is so read, the question I have asked admits of only one answer. The clause provides for annual remuneration for annual service. That remuneration, so far as it consists of commission, is not the less earned by the year's service because it cannot be ascertained until a later date.

I read on, prepared to find in the following clauses provisions which may confirm, or be irreconcilable with, the *prima facie* meaning of clause 8. Clause 9 provides that the fixed salary and expenses shall cease at the termination of the agency, but after such termination (whether by death of the underwriter or otherwise) the Company shall be entitled to wind up the underwriting and the accounts in connection therewith and shall be paid for its services in connection therewith a remuneration of not less than one hundred guineas. This clause looks forward to clause 14, which provides that "Either of the parties may terminate the agency on the Thirty-first "day of December One thousand nine hundred and or on the "Thirty-first day of December of any succeeding year by giving "to the other party six months' previous notice in writing . . ." There was some controversy whether the date of termination should be the year of the agreement or a later year. I do not think that it matters.

Clauses 9 and 14 appear to me strongly to confirm the natural meaning of clause 8. I will adopt the convenient method that was used in argument. Let year 1 be the year in which risks are first written; then at the end of year 3 the profit in respect of those risks, i.e., "the net profits on the underwriting of year 1", is ascertained. During year 1 the Company's duties will necessarily be confined to performing its covenanted service under the agreement in respect of risks written in that year. In year 2 further risks are written, and in that year the Company's duties will cover the risks written in that year and in year 1. So in year 3 its duties will cover the risks written in year 3 and the two previous years. What, then, happens if the agency is terminated at the end of any year ? Something must be done, for if nothing is done risks that have not run off are left in the air. Accordingly it is provided by clause 9 that if the agency is determined the Company shall be entitled to wind up the underwriting and the accounts in connection therewith. It may not write any risks, but it may, not must, wind up the underwriting. And if it does so, it is to be paid a remuneration of 100 guineas, i.e., 100 guineas for a Name, a substantial reward. This is so clearly inconsistent with the view put forward by the Company, that it did not earn its commission on the net profits of the underwriting of year 1 until the accounts had been made up at the end of year 3, that learned Counsel for the Appellants was driven to an extravagant argument upon clause 9. He urged upon the House that the Company, notwithstanding the termination of the agency, was yet bound to carry out all the duties which the agreement imposed upon it in relation to outstanding risks; that the agency could only be "termina- "ted" in the sense that the Company was no longer authorised to write new risks, and that the expression "to wind up the under- "writing and the accounts in connection therewith" meant something else than the performance of those duties, such as settling claims, etc., in regard to outstanding risks, which were the necessary

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prelude to making up accounts and ascertaining profits. What else those plain words meant was not clear to me.

My Lords, I see no reason whatever for doubting that the words "terminate the agency" in clauses 9 and 14 mean the same as "terminate the agreement" or, if you like, "terminate the agency "agreement", and that nothing else is contemplated than the conclusion of the rights and obligations of the parties to the agreement. Nor can the words "wind up the underwriting", etc., in clause 9 have any other than their natural meaning. If so, that is an end of the Appellants' case, for no reason has been suggested why the Company should be paid 100 guineas per Name for performing duties which without that reward it was bound to perform.

A further argument was founded on the language of clause 10. This clause (to state it shortly) provides that the Company shall keep an account for the first and each subsequent year of the agency, and shall carry to the account of such year the relative credit and debit entries, and shall make up and balance such account at the end of the second year after that to which it relates, and that the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the year to which it relates, and that the commission payable to the Company shall be calculated and paid thereon. It was urged that it was implicit in this clause that the Company was bound, notwithstanding the termination of the agency, to carry on its duties in regard to risks already written. But it appears to me that this argument really begs the question. I should assume, in the absence of some express provision to the contrary, that an obligation imposed by a contract of service or agency was operative during the term of that contract and that the termination of the contract determined the obligation. I see nothing in clause 10 which is inconsistent with this view. But on the contrary, giving to it its natural meaning, namely, that contract and contractual obligation are co-terminous, I find in clause 9, giving to that clause also its natural meaning, exactly the provision that might be expected in order that the agency agreement might be carried to a businesslike conclusion.

Certain other clauses were also relied on as suggesting that the commission in respect of the profits on a year's underwriting was not earned until the end of the second year after that year, but I do not think it necessary further to examine them. It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not accrue for Income Tax purposes in that same year, though it was not ascertainable until later. So, indeed, thought the Master of the Rolls, who treated the matter as one beyond dispute as soon as it was determined in what year the commission was earned. Nor would any other conclusion be consistent with a long line of authority beginning with *Isaac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 768, and including *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927, a decision of this House which seems to me to govern the present case.

Your Lordships were, however, pressed with, first a decision of the Court of Session, *Dailuaine-Talisker Distilleries, Ltd.* v. *Com-*

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missioners of Inland Revenue, 15 T.C. 613, and secondly, two decisions of this House, *John Cronk & Sons, Ltd.* v. *Harrison*, [1937] A.C. 185 (20 T.C. 612), and *Absalom* v. *Talbot*, [1944] A.C. 204 (26 T.C. 166). The Scottish case appears to me to have turned upon the construction of a contract of a very peculiar nature, and the decision may perhaps be justified by that fact. But I must, with deference to the learned Judges who took part in it, express a grave doubt as to its correctness. In the two cases before this House, to which I have referred, the question now under discussion was not raised. The issue in *Harrison's* case was not to what year profits, which had in fact been ascertained, should for Income Tax purposes be ascribed, i.e., when were they earned, when did they accrue or arise ? On the contrary, the profits not having been ascertained, the issue was whether certain sums, which were admittedly subject to possible diminution, should be brought into charge at their face value, as the Crown contended, or, as the subject in the alternative successfully contended, should be brought into charge at their then present value. It was the latter view that prevailed in this House, though in consideration of the possibility that no valuation was possible, the rider was added to the effect that in that event only such sums should be treated as receipts of the periods in question as were actually received. I find nothing in this decision which in any way supports the plea of the Appellants in the present case. In *Absalom's* case somewhat similar considerations arose, and again it appears to me that there is nothing in this decision which is in conflict with the authority of the *Newcastle Brewery* case(1) or assists the Appellants.

This appeal, in my opinion, should be dismissed.

Lord Normand (read by Lord Wright).—My Lords, I agree with the construction which my noble and learned friend on the Woolsack and my noble and learned friend Lord Porter have put on the agreements between the Appellant Company and their principals. I agree also with the exposition of the principles on which the profits, though not payable nor even ascertainable till a later year, are brought into the accounts for the year in which they are earned. I wish only to add that I find much in the opinion of the majority of the Court in *Dailuaine-Talisker Distilleries, Ltd.* v. *Commissioners of Inland Revenue*, 1930 S.C. 878 (15 T.C. 613), which is not reconcilable with these principles, and I think that the dissenting opinion of Lord Morison should be preferred.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

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

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(1) 12 T.C. 927.

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