Tuesday, January 23.

FIRST DIVISION.

[Exchequer Cause.

GLASGOW EXPANDED METAL COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Company—Directors' Fees—Directors Holding a "Controlling Interest"—Company Assessed as a Partnership—Finance Act 1916 (6 *and* 7 *Geo. V, cap.* 24), *sec.* 49 (1).

The Finance Act 1916, section 49, empowers the Commissioners, in assessing a company, whose directors have a "controlling interest" therein, to excess profits duty, to treat the company as if it were an ordinary partnership, the result being that the sums paid as fees to its directors become part of the profits of the company. Out of a total number of 7600 shares in a company the directors held 4300 among them.

Held that the fact that the company allowed the directors' remuneration to be fixed by the managing director did not so restrict or impair the powers of the company, and the controlling interest of the directors in regulating these powers, as to elide the effect of section 49, and that the Commissioners were therefore entitled to treat the company as if it were a firm.

The Finance Act 1916 (6 and 7 Geo. V, cap. 24) enacts—Section 49 (1)—"Where the pre-war standard of profits is taken to be the percentage standard, or is calculated by reference to the statutory percentage, in the case of any trade or business owned or carried on by a company or other body corporate whose directors have a controlling interest, the Commissioners of Inland Revenue may, if they think fit, as respects any accounting period, including a past accounting period, for the purpose of the provisions relating to the statutory percentage, and for the purpose of the determination and computation of profits under Part I of the Fourth Schedule to the principal Act, treat the company or body corporate as if it were a firm and not a company or body corporate, and the directors or any of them as if they were partners in the firm."

The Glasgow Expanded Metal Company, Limited, *appellants*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to inhabited house duties for the Lower Ward of Lanarkshire at Glasgow, sustaining an assessment to excess profits duty, appealed by way of Stated Case, in which J. Anderson, Inspector of Taxes, Glasgow, was *respondent*.

The assessment appealed against, which was made under the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), was in respect of the accounting period ending 31st December 1918 on the sum of £2419, the duty on which at the rate of 80 per cent. being £1935.

The Case stated, *inter alia*—"The following *facts* were admitted or proved:—1. The company was incorporated on the 30th day of December 1914, and by its articles of association the regulations in Table A of the First Schedule of the Companies (Consolidation) Act 1908 were made applicable to the company so far as not excluded, altered, or modified by the said articles. . . . 2. The company's capital consists of 6000 preference shares of £1 each and 4000 ordinary shares of 2s. 6d. each, of which 3600 preference shares and 4000 ordinary shares have been issued and subscribed. The company is a private one consisting of twenty-three shareholders, seven of whom are directors who hold the following shares:—. . . . . The directors thus hold 4300 shares out of a total number of 7600 shares. 3. Mr W. S. Gallie is managing director, and Messrs Watt, M'Cubbin, Fergusson, Graham, Cairns, and Hindson are also directors. Mr Graham is secretary, and Messrs Cairns and Hindson are representatives of the company in London and Manchester respectively, and as such these three gentlemen receive salaries. 4. Remuneration has been paid to the directors as follows:—1915, £255; 1916, £265; 1917, £265; 1918, £1975. At the fourth ordinary general meeting of the shareholders held on 21st February 1919 an honorarium of £600 was voted for allocation amongst the directors as they might determine. By mutual agreement this was divided as follows:—

John Fergusson . . .	£50
W. S. Gallie	150
Hugh Watt	150
Thos. M'Cubbin . . .	150
John B. Graham . . .	50
John Cairns	25
J. J. Hindson	25
	£600

included in above £1975. 5. Article 9 of the company's articles of association gives the managing director power to fix the remuneration payable to the managers, agents, and servants of the company. Article 11 provides that a director shall not vacate office by reason of holding any other appointment under the company although he receives remuneration therefor. Article 12 provides that the remuneration of the directors as such (including the managing director) shall be payable only out of surplus profits remaining in each year after payment to preference and ordinary shareholders of dividend and share of profits specified in paragraphs (*a*) and (*b*) of clause 2 of the articles. 6. By section 69 of Table A, First Schedule, to the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) it is provided that the remuneration of the directors shall from time to time be determined by the company in general meeting. 7. The company having been incorporated in December 1914 had no pre-war standard for the purposes of excess profits duty, and consequently its pre-war standard must be taken to be the statutory percentage on the average amount of capital employed in its business during the accounting period as provided by the Finance (No. 2) Act 1915, Fourth Schedule, Part II, Rule 4. 8. By the

Finance Act 1916, sec. 49 (1), the Commissioners of Inland Revenue may, where the pre-war standard of profits is calculated by reference to the statutory percentage, in the case of any business carried on by a company whose directors have a controlling interest, if they think fit, treat the company as if it were a firm, and the directors or any of them as if they were partners in a firm. Proceeding upon this section the Commissioners of Inland Revenue have treated the company as if it were a firm, and written back to profits the whole of the directors' remuneration in the accounting period to 31st December 1918. 9. There is no dispute in regard to the figures involved in this case, and the only point at issue is the question whether the directors have a controlling interest in the company, and if so, whether the Commissioners of Inland Revenue were right in treating it as if it were a firm, and the directors as if they were partners in such firm.

"The Commissioners having considered the points raised, found as a fact that the directors of the company possessed a controlling interest, and that consequently the Commissioners of Inland Revenue could treat the company as a firm and its directors as partners of such firm. The Commissioners accordingly dismissed the appeal and confirmed the assessment."

Argued for the appellants—The expression "directors" referred to in the Act meant effective directors. In this company the directors, acting rather in the capacity of employees as they did, had no real "controlling interest." They exercised no control over the company's internal policy, nor over the remuneration payable to the directors. The following authorities were referred to:—*Dillworth* v. *Commissioners of Stamps*, (1899) A.C. 99, *per* Lord Watson at p. 105; Buckley on the Companies and Limited Partnership Acts (9th ed.), pp. 619, 622.

Counsel for the respondent was not called upon.

LORD PRESIDENT—This appeal arises out of an assessment to excess profits duty for the accounting period which ended on 31st December 1918. In making that assessment the Commissioners resorted to the provisions of section 49 of the Finance Act 1916. According to that enactment, in the case of a company whose directors have what the section calls a "controlling interest," the Commissioners are entitled to treat the company as if it was an ordinary partnership, and the result of that is that sums which have been paid by the company as fees to its directors become a part of the profits of the company itself. Now the question which the appellants have raised is whether the condition for the application of that section is established—whether, that is to say, in the case of the present company the directors had or had not a "controlling interest." It seems to me that the only interpretation which can be given to that expression is by reference to the power which the number of shares held by the directors give them to control the disposal of the company's assets and the administration of its affairs at a general meeting of the company. If that be the true interpretation of those words, then there is no doubt that in the case of the present company the seven directors did have a controlling interest within the meaning of the section, because they held among them shares enough to enable them (if they were minded to act together) to turn the decision of any general meeting of the company. It is nothing to the point that three of the directors were also employees. The appellants founded on certain of the articles of association, and in particular upon article 9, which gives the managing director power for the first three years of the company's existence to fix the remuneration of "managers, agents, and servants of the company." The argument was that "managers" includes directors, and that as the company had acquiesced in the managing director's appointment of the directors' fees, not only in the first three years of the company's existence but also in the fourth, the question of directors' remuneration was not a matter upon which the controlling interest of the directors in the capital of the company could be of any importance. I am unwilling to say anything with regard to the construction of this company's constitution, or with regard to the mode in which it may have been interpreted or acted on by the managing director, which is not necessary for the determination of the present case. I confine myself therefore to saying that I do not see that there is anything stated in the Case upon which the Commissioners would have been entitled to find that, even as regards the appointment of directors' fees, the powers of the company (and the controlling interest of the directors in regulating the use of those powers) were so impaired or restricted as to elide the effect of section 49.

LORD SKERRINGTON—The facts which are set forth in the Case as having been admitted or proved do not, in my judgment, demonstrate or even suggest that the General Commissioners committed any error of law when they found as a fact that the directors of the company had what section 49 (1) of the Finance Act 1916, describes as "a controlling interest." That being so, it was within the discretion of the Commissioners of Inland Revenue to treat the company as if it were a firm, and the directors or any of them as partners of such firm. It was not argued that this discretionary power, assuming the Commissioners to possess it, had not been legally exercised. The determination of the Commissioners ought therefore to be affirmed.

LORD CULLEN—I am of the same opinion. The share holdings of the directors are such as to give them a preponderating vote on any question which comes before the shareholders in general meeting. *Prima facie* that means that they possess a controlling interest in the company, in whatever way they or some of them may choose to exercise it, and I do not think we have heard anything to displace that view.

LORD SANDS was absent.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Mackay K.C. —M. J. King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—The Lord Advocate (Hon. W. Watson, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Wednesday, January 24.

SECOND DIVISION.

[Land Court.

CLELLAND *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Landlord and Tenant—Small Holdings—Statutory Small Tenant—Right to Renewal of Tenancy—"Notwithstanding any Agreement to the Contrary"—Yearly Tenant Entering into Missives Providing for Monthly and Seasonal Tenancy—Subsequent Application to Land Court—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 32 (4).

The Small Landholders (Scotland) Act 1191, section 32 (4), provides—"Except in any case where the landlord satisfies the Land Court that there is reasonable ground of objection to a statutory small tenant . . . and the Land Court find accordingly, the tenant for the time being shall, notwithstanding any agreement to the contrary, be entitled on any determination of the tenancy to a renewal thereof on the terms and conditions hereinafter specified."

A tenant who fulfilled the requirements necessary to constitute him a statutory small tenant within the meaning of the Act, entered into missives with his landlord whereby he agreed to become a monthly tenant of the house and byre on his holding and a seasonal tenant of the grazing. At the time the missives were signed both parties were in ignorance of the provisions of the Small Landholders Acts. The tenant afterwards applied to the Land Court for an order to be judicially declared a statutory small tenant. *Held* that the missives constituted an agreement struck at by the Act, and that he was entitled to the order craved.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 42 (4), is quoted *supra in rubric.*

William Baird & Company, Limited, *respondents and appellants,* being dissatisfied with a decision of the Land Court in an application at the instance of William Clelland, Dalry, Ayrshire, *applicant and respondent,* for an order determining whether he was a landholder or a statutory small tenant, appealed by way of Special Case.

The Case stated—"1. Under the Small Landholders (Scotland) Acts 1886 to 1919 the said William Clelland applied to the Scottish Land Court on 9th April 1921 for an order determining whether he was a landholder or a statutory small tenant of the subjects specified in the schedule annexed to the application, and fixing a rent and period of endurance therefor. The subjects in question are situated at Carsehead, Dalry, Ayrshire, and consist of a house and stable (subsequently converted into a byre) and a field extending to 1·191 acres. It was not pleaded by the landlords that the subjects did not constitute a holding within the meaning of the statutes. It was not proved that the applicant or his predecessors in the same family had executed the greater part of the improvements, and consequently the applicant could not claim that he could establish any right to be declared a landholder. The question in the case therefore is whether the applicant has established his right to be declared a statutory small tenant. 2. The facts admitted or proved are as follows:—At 1st April 1912 the applicant was a yearly tenant of the subjects in question, holding the same on tacit relocation following upon a series of leases entered into between the proprietors and his father, who became tenant in 1869 and died in 1888. The endurance of the said leases was for seven years from the term of Candlemas as to the land, and from the term of Whitsunday as to the houses. The rent was payable at two terms in the year, Martinmas and Whitsunday, by equal portions, and otherwise the leases contained the usual clauses of an ordinary agricultural lease. The last lease ran for seven years from Candlemas and Whitsunday 1882, and the applicant's father died during its currency. The applicant has since remained in possession of the subjects. He has from a date prior to 1st April 1912 resided on and cultivated the holding. Subject to the decision of the question raised by the facts hereafter narrated, he fulfilled the requirements necessary to constitute him a statutory small tenant within the meaning of section 2 (iii) (*b*) of the Small Landholders (Scotland) Act 1911. In January 1921 a meeting took place in the office of the appellants' company, at which Mr Brand, a director of the company, Mr Russell, the cashier, and the applicant were present. At this meeting it was explained to the applicant that on account of the necessities of their business the company might require possession of the subjects occupied by him at short notice, and that it was necessary that some new arrangement with regard to the tenancy should be made between him and the company. The arrangement proposed was that the applicant should become merely a seasonal tenant of the field, and that he should hold the house and stable or byre from month to month. At that meeting the applicant did not give his consent to this new arrangement, but he undertook to consider the matter. A few days afterwards Mr Russell sent for the applicant and asked him whether he was prepared to accept the company's terms. In the interval between the two meetings Mr Russell had typed out in the form of offer and acceptance the company's