ment effected by the missives if that agreement was "to the contrary" of the provisions of the sub-section. Had the agreement effected by the missives that character? The appellants' counsel maintained that it had not, inasmuch as it was entered into, not for the purpose of eliding the provisions of the sub-section, but in order to establish a new tenure. It was, indeed, an indirect consequence of the agreement that the respondent was deprived of his statutory right of renewal of tenancy, but this, it was contended, did not bring the agreement within the terms of the sub-section. This indirect consequence was described as a mere bye-product of the agreement, and it was urged that accordingly the agreement did not fall within the terms of the sub-section. This is probably too narrow a construction to adopt. The result is the same as if the respondent had stipulated expressly not to apply for renewal of yearly tenancy, and the agreement effected by the missives would thus seem to be contrary to the provisions of the sub-section and to be accordingly invalid in law. But whether or not the order of the Land Court is justified by the letter of the sub-section, I am satisfied that it is in conformity with the spirit of the Act, whose main purpose is to give fixity of tenure at a fair rent to those who have since the passing of the Act been possessing small holdings as yearly tenants. The respondent has possessed the holding on yearly tenancy since the Act came into operation.

I am therefore prepared to approve of the order which the Land Court pronounced and to answer the question of law as suggested by your Lordship.

The Court answered the question of law in the affirmative.

Counsel for the Applicant and Respondent—Morton, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents and Appellants—Macmillan, K.C.—Patrick. Agents—Laing & Motherwell, W.S.

Tuesday, January 30.

FIRST DIVISION.

[Exchequer Cause.

DUNCAN *v.* INLAND REVENUE.

Revenue—Income Tax—Super Tax—Estimation of Income for Super Tax—Dividends Applicable to Different Trading Years Received in the Same Fiscal Year—Income Tax Act 1918 (*8 and 9 Geo. V, cap.* 40), *sec.* 5 (3) (*c*).

A shareholder in a limited liability company received for each of the trading years ending 31st December 1916, 1917, 1918, and 1919, annual dividends of £10,000. The dividend for 1916 was declared and paid on 27th April 1917, that for 1917 on 28th March 1918, that for 1918 on 11th April 1919, and that for 1919 on 2nd April 1920, with the result that the first two of these dividends were received by him during the fiscal year ending 5th April 1918, and the second two during the fiscal year ending 5th April 1920. All were paid subject to deduction of income tax at source. *Held* that the Revenue was entitled to treat the shareholder, for purposes of super tax, as having received from his business in each of the two fiscal years ending 5th April 1918 and 5th April 1920 an annual income of £20,000, and to treat him as regards the other two years as having received no income from his business at all, and that therefore his income for the purposes of super tax fell to be estimated accordingly.

Revenue—Income Tax—Super Tax—Finality of Assessment—Returns for Particular Year Showing Dividends from which Income Tax had been Deducted at Source—Total Income for that Year Assessed with Reference to these Returns—Right of Commissioners in Following Year to Re-open Assessments to Super Tax and Make Additional Assessments—Income Tax Act 1918 (*8 and 9 Geo. V, cap.* 40), *sec.* 5 (2).

Income tax was deducted at source from certain dividends which a shareholder in a limited liability company received in respect of each of two particular trading years, although both the dividends were actually declared and paid during one particular fiscal year. He was assessed to super tax on his whole income *quoad* each of these trading years based on his own returns. *Held* that the Commissioners were not barred from re-opening the assessments to super tax and making additional assessments, the fact that the dividends in question had appeared in the annual returns made by the shareholder as income from which tax had been deducted, and had been taken into account in estimating his income from all sources in order to determine the rate of tax, not amounting to an assessment of these sums in the sense of sub-section 2 of section 5 of the Income Tax Act 1918.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 5, enacts—"(1) For the purposes of super tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under this Act, but subject to the provisions hereinafter contained. (2) Where an assessment to income tax has become final and conclusive for the purpose of income tax for any year, the assessment shall also be final and conclusive in estimating total income from all sources for the purposes of super tax for the following year, and no allowance or adjustment of liability on the ground of diminution of income or loss shall be taken into account

in estimating the total income from all sources unless that allowance or adjustment has been previously made in respect of income tax on an application under the special provisions of this Act relating thereto. (3) In estimating the income of the previous year for the purpose of super tax— . . . (*c*) Any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, and any deductions allowable on account of any annual sums paid out of the property or profits of the individual shall be allowed as deductions in respect of the year in which they are payable notwithstanding that the income or the annual sums, as the case may be, accrued in whole or in part before that year."

William Duncan, 14 Laverockbank Terrace, Leith, *appellant*, being dissatisfied with the decision of the Commissioners for the Special Purposes of the Income Tax Act, *respondents*, in confirming two additional assessments to super tax on the sums of £10,000 each made upon him for the fiscal years ending 5th April 1919 and 5th April 1921 respectively, appealed by way of Stated Case.

The Case stated—"The following facts were admitted or proved:—1. By first assessments, based upon the appellant's own returns, . . . the appellant was assessed to super tax as follows:—

For the year ended 5th April 1919 in the sum of £10,810
" " " 1920 11,387
" " " 1921 12,119

2. The returns upon which these assessments were based included in each case a dividend of £10,000 paid upon shares held by the appellant in W. & M. Duncan, Limited (hereinafter called the company). 3. The company makes up its accounts to 31st December in every year. Subsequently to the making of the first assessments above referred to and to the payment of the duty thereunder, it was ascertained that dividends upon the appellant's shares in the company had been declared and paid as follows:—

For the year to 31st December 1916, dividend declared and paid to appellant on 27th April 1917 of £10,000
For the year to 31st December 1917, dividend declared and paid to appellant on 28th March 1918 of 10,000
For the year to 31st December 1918, dividend declared and paid to appellant on 11th April 1919 of . 10,000
For the year to 31st December 1919, dividend declared and paid to appellant on 2nd April 1920 of . 10,000

It is thus apparent that dividends amounting to £20,000 were received during the year ended 5th April 1918, and that a similar sum was received during the year ended 5th April 1920, and that no dividend was received by the appellant during the year ended 5th April 1919. 4. The additional assessments of £10,000 each appealed against were made for the purpose of including a second sum of £10,000 in the computation of the appellant's income for each of the two years ended 5th April 1918 and 5th April 1920. At or about the same time the first assessment of £11,387 made upon the appellant for the year ended 5th April 1920 by reference to his income for the previous year ended 5th April 1919 was cancelled, and it was intimated to him that it was proposed to set the amount overpaid (viz., £1499, 11s. 6d.) for the year 1919-20 against the additional duty payable for the year 1918-19. 5. The appellant has year by year, in making his income tax returns, filled up forms to show his total income as estimated by him for income tax purposes. In these forms he has shown one dividend of £10,000 separately for each of the years in question in this appeal. That dividend was not shown in section C of the Income Tax Return (official form) being that containing "particulars of untaxed income for assessment under Schedule D." It was shown in section D of the return, being that which is required for the purpose of any "claim for exemption, abatement, or reduction of rate of tax," and sets forth (1) Particulars of every source of income with the amount derived from each source whether tax has been paid on it or not, and (2) particulars of charges on such income. The appellant made in each of the years in question a claim for allowance in respect of life assurance premiums . . . . 5*a*. In due course the appellant received in each year from the assessor a notice showing (1) the 'amount of assessment' under Schedules D and E respectively, (2) the appropriate deductions, (3) the taxable income, (4) the 'tax chargeable thereon,' and (5) the instalments thereof payable (*a*) on or before 3rd January, and (*b*) on or before 1st July of the year to which the notice applied. The 'amount of assessment' set out in the said notice did not include the said annual dividend of £10,000, that being the subject of charge for income tax by way of deduction at the source and before receipt. The appellant duly paid the amounts brought out in said notices as payable by him and received a discharge stamped upon the notices. . . . .

"Mr Gentles, K.C., counsel for the appellant, contended—1. That 'assessment to income tax' in section 5 (2) meant estimation or valuation of income for income tax purposes; and (2) that the appellant had yearly in his returns for income tax purposes included the dividends in question, and that accordingly the annual estimation of his income for income tax purposes was final for super tax purposes. 3. That section 5 (2) of the Income Tax Act 1918 governed this case, and was conclusive in appellant's favour, that section 5 (3) (*c*) was subsidiary to section 5 (2), and was introduced to deal with anything left open by that section. 4. That in the circumstances stated the Commissioners were barred from re-opening or cancelling the assessments for the years 1918-19, 1919-20, and 1920-21, and from making the additional assessments appealed against.

"On behalf of the Commissioners of Inland Revenue it was contended—1. That 'assessment to income tax' in section 5 (2) meant an actual assessment laid on by the

Commissioners, and that section 5 (2) had no application. 2. That even if 'assessment' could be construed as 'estimation,' the estimation of income chargeable with income tax by way of deduction could only be done in accordance with the provisions of section 5 (3) (*c*), which was the only section dealing with the estimation of such income; and (3) that as the dividends were income chargeable with income tax by way of deduction section 5 (3) (*c*) was conclusive, and the additional assessments were accordingly correctly made."

[*Article* 5, *with the exception of the first two sentences, and article* 5 (*a*) *were added by way of amendment in the course of the hearing.*]

The *questions of law* for the opinion of the Court were—"1. Whether the two dividends of £10,000 each were properly included in the computation of the appellant's income for the years ended 5th April 1918 and 5th April 1920 for the purposes of the super tax assessments for the years ended 5th April 1919 and 5th April 1921? and (2) whether in the circumstances stated the Commissioners are barred from cancelling or re-opening the assessments to super tax for the years ended respectively 5th April 1919, 5th April 1920, and 5th April 1921, and making the additional assessments appealed against."

The parties' arguments appear sufficiently from their contentions as stated in the Case.

LORD PRESIDENT—This case arises out of two additional assessments to super tax which were made upon the appellant on two sums of £10,000 each for the fiscal years ended 5th April 1919 and 5th April 1921. The appellant conducts a business under the form of a limited liability company, and from that company he received for the trading years ended 31st December 1916, 1917, 1918, and 1919 respectively, annual dividends of £10,000 each. The company's annual meetings at which these four dividends were declared took place about the end of March or in the immediately succeeding month of April. As chance would have it two of these annual meetings were held within the fiscal year ended 5th April 1918 and the other two within the fiscal year ended 5th April 1920, with the result that two annual dividends were declared by the company—and thus became receivable by the appellant—in the first of those two fiscal years and two in the second. All the dividends were paid subject to deduction of income tax at source. The claim of the Revenue is to treat the appellant, for purposes of super tax, as having received from his business in those two fiscal years an annual income of £20,000, and to treat him as regards the fiscal years ending 5th April 1917 and 5th April 1919 as having received no income from his business at all. The effect of this is to increase the burden laid upon the appellant, in respect of what I may call the super-added sums of £10,000, by making those sums subject to the higher and increasing rates of super tax applicable to an income of more than (say) £12,000—such in round figures being the true amount of the appellant's income on the footing that the annual profits accruing to him from his business in each year are measured by the sum of £10,000.

I did not understand it to be in dispute between the parties that the effect of section 5 (3) (*c*) of the Income Tax Act of 1918 is that in the case of income chargeable with income tax by way of deduction the rule is that such income is treated, for purposes of super tax, as income of the year in which it is actually receivable. It follows that if, whether by accident or otherwise, the company happens to declare two dividends in one fiscal year (both dividends being payable subject to deduction of income tax) then both dividends are, for purposes of super tax, income of the year in which they were declared and so became receivable.

But the appellant founds upon the second sub-section of section 5. To appreciate the effect of that enactment it is necessary to refer to the first sub-section whereby the income of the taxpayer for purposes of super tax has to be ascertained by way of estimate of his income from all sources in the year previous to the year of assessment—such estimate being framed exactly as would be the case if the taxpayer were asking for abatement or exemption. That is the general method of ascertaining the amount of the taxpayer's income for purposes of super tax. But the second sub-section substitutes for the method of *estimate* another and different method in the case of any part of the taxpayer's income which in the year preceding the year of assessment has been made the subject of an assessment to income tax, provided that such assessment has become final and conclusive. Any part of the taxpayer's income to which these conditions apply is taken out of the sphere of estimate altogether, and the amount at which it was assessed to income tax in the previous year is held to be the amount at which it is assessable to super tax in the year of assessment.

Now the appellant contends that this sub-section applies to the annual dividends he received from the company. We are asked to decide this question in relation to the assessment to income tax made on the appellant for the year ending 5th April 1920 and the relative return sent in by the appellant in June 1919. For the purposes of the present case parties are agreed that we may take the circumstances of this assessment and relative return as typical of those which prevailed in each of the years implicated in the case. In assessing the appellant's income to income tax in the year ending 5th April 1920 it was essential to have regard to the amount of his total income, inasmuch as the rate at which the tax was chargeable depended upon the amount of that income. From the notice of assessment served upon the appellant for that year it is apparent that the income covered by it is taxed at the highest of the possible rates under the Finance Act in operation at that time, namely, 6s. in the £. The assessment, notice of which was thus given to the appellant, was not, of course, an assessment which dealt directly with his whole income, inas-

much as those items which had already suffered deduction of tax at the source are not mentioned in it. But the appellant says quite truly that it did assess the (hitherto untaxed) items mentioned in it to income tax at a rate which could not have been applied without a determination by the Commissioners upon the amount of his total income from all sources, and he points to the return of his total income from all sources with reference to which the Commissioners arrived at that determination. In that return the appellant did in point of fact disclose his whole income, including £10,000 as the amount of the annual profits arising or accruing to him (by way of dividend and bonus) on his shares in the company. This disclosure was made in section D of the return. That section is headed "Claim for exemption, abatement, or *reduction of rate of tax*," and, as appears from its terms, it is a return which it was necessary for the taxpayer to make and for the Commissioners to have before they could fix the rate at which the appellant was chargeable with tax. In short, it played a vital and indispensable part in the assessment of the hitherto untaxed items of his income to income tax. There is, I think, no doubt about that. The result is that upon the return made under section D—a return which included the full year's dividend of £10,000—the Commissioners arrived at the determination, not only that there should be no abatement or exemption of tax, not only that the tax should be charged on the hitherto untaxed income at 6s., but that it should be so charged because it was chargeable at that rate on the income as a whole. The appellant argues that in substance and effect that determination was one which decided that the whole of the appellant's income was assessable to income tax at 6s., and this determination (he says) involves and amounts to the assessment of his whole income—including the annual dividend of £10,000—within the meaning of the second sub-section of section 5. There is a sense in which this is truly the case, and the Inland Revenue's answer is a strictly technical one. That answer is that the assessment of income to income tax is a step in the statutory procedure separate and distinct from anything concerned with the deduction of income tax at source, and that an assessment within the meaning of the second sub-section covers no income except that which is specifically included therein. The words of the sub-section are these—"Where an assessment to income tax has become final and conclusive for the purposes of income tax for any year the assessment shall also be final and conclusive in estimating total income from all sources for the purposes of super tax for the following year. . . ." I assume that the reference to finality is a reference to the stage which is reached when a notice of assessment has been duly signed and issued, subject, of course, to the possibility of an appeal. If there is no appeal, then I take it that the notice is final and conclusive for the purposes of income tax when it is served upon the taxpayer. I see no other meaning that can be given to the words "final and conclusive," although no doubt it is true that the Commissioners have power to issue a supplementary assessment, and the taxpayer in certain circumstances is entitled to have the assessment revised at a later stage. But the whole system of the Income Tax Act is artificial and technical in the extreme, and I think the Inland Revenue is technically right in maintaning that the words "where an assessment to income tax has become final and conclusive" refer, and refer exclusively, to the income comprehended in the notice of such assessment, the chargeability of which income is—subject to a possible appeal—finally and conclusively settled by the service of the notice. The claim of the Revenue must be sustained if it is supported by the terms of the taxing Act, even though, as has been frequently observed, the letter of the law leads to a result which (as in the present case) seems unjust and oppressive. I am unwillingly compelled to conclude that the conditions required by section 5 (2) were not met by the assessment actually made on the appellant for the year ending 5th April 1920, and the result is that, in my opinion, we have no alternative but to refuse the appeal.

LORD SKERRINGTON concurred.

LORD CULLEN—No question has been raised by the appellant as to the construction of section 5 (3) (*c*) upon which the Crown here proceeds. It lays down a perfectly specific rule for estimating the income of a previous year for the purposes of super tax, which is that any income which is chargeable to income tax by way of deduction shall be deemed to be income of the year in which it is receivable. Now the assessment to super tax here in question has been made in accordance with that rule, and therefore it is right, unless there be found in the Act some provision which overrides section 5 (3) (*c*) and forbids its application in the circumstances of this case. I am, however, unable to find any such overriding provision. What the appellant founds upon is subsection 2 of section 5. Whatever may be the precise scope and effect of that subsection, it is clear that it postulates an assessment having been made on the party which has become final and conclusive. I do not think that here there was any assessment made on the appellant *quoad* the dividends in question. The tax was deducted at the source before receipt without the necessity for any assessment being made. The fact that the dividends appeared in the returns referred to in the amendment does not, as it seems to me, make these dividends the subject-matter of an assessment on him, any more than would the fact that interest of money and other annual payments falling under section 19 had appeared similarly in such returns have made such interests and annual payments the subject of an assessment on him contrary to the provisions of that section.

I agree accordingly that the appeal should be dismissed.

LORD SANDS was not present.

The Court answered the first question of law in the affirmative and the second question in the negative.

Counsel for the Appellant—Gentles, K.C. —Macdonald. Agents—Cornillon, Craig, & Thomas, W.S.

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

Friday, December 15, 1922.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* BROWN AND OTHERS.

Succession—Accumulations—Implied Direction to Accumulate — Applicability of Thellusson Act (39 *and* 40 *Geo. III, cap.* 98).

A testator directed his trustees, *inter alia*, to set apart and hold a sum of £120,000 for behoof of the elder of his sons in liferent, for his liferent alimentary use allenarly, and the son's children in fee, the fee being payable to the children upon their respectively attaining the age of twenty-five years, with a destination-over in the event of their failing to attain that age. Provisions subject to the same conditions were made for the younger son and the testator's daughters and their children. With regard to the residue of his estate the testator directed his trustees to hold certain further sums for his daughters and their children subject to the same conditions as those applicable to the original bequests and under the declaration that "the increased provisions out of residue shall not be payable until my trustees shall have accumulated sufficient funds to meet the whole of the same." The remainder of the residue was bequeathed to his two sons equally, the issue of either son in the event of his predeceasing the time of payment to be entitled on their respectively attaining the age of twenty-five years to their parent's share, with a destination-over in the event of failure of issue. Power was given to the trustees to apply during the minority of the beneficiaries the whole or such portion as they should think proper of the annual income towards the maintenance, education, and upbringing of the prospective fiars. The testator's estate at the date of his death consisted mainly of unexhausted minerals and was not then sufficient to pay the original and the residuary legacies. As funds became available the trustees set aside sums in accordance with the testator's directions. The elder son, who died shortly after the testator, enjoyed during his lifetime the liferent of the £120,000, but received no part of the share of the residue destined to him. After his death the trustees accumulated such part of the income of the £120,000 as they did not use for the benefit of his children, and having set aside sums to account of his share of residue accumulated the income thereof. The elder son's children did not attain twenty-five years of age until more than twenty-one years after the testator's death. *Held* that there was an implied direction to accumulate, and that accordingly the restrictions of the Thellusson Act applied to the income accruing from the sum of £120,000 and from the elder son's share of residue after the expiry of twenty-one years from the testator's death.

Mitchell's Trustees v. *Fraser*, 1915 S.C. 350, 52 S.L.R. 293, *distinguished.*

Succession—Will—Construction—Accumulations Struck at by Thellusson Act—Whether Falling into Residue or into Intestacy—No Beneficiary with Vested Right.

By the residuary clause of his settlement a testator directed his trustees with regard to the residue of his estate, including therein all accumulations of revenue so far as not required for the purpose of the trust, to pay and convey it at a postponed term of payment equally between his two sons, the issue of either son predeceasing the term of payment to take their respective parent's share on attaining twenty-five years of age. The elder son predeceased the term of payment without having acquired a vested right in his share of residue, and none of his children attained the age of twenty-five until more than twenty-one years after the testator's death. *Held* (1) that, looking to the terms of the residuary clause, accumulations prohibited by the Thellusson Act fell into residue, but (2) that so much as did not fall to be paid away under a vested and payable residuary gift did not fall to be added to residue but fell into intestacy.

Succession—Accumulations Struck at by Thellusson Act—Income Arising from Accumulated Rents of Heritage and Falling into Intestacy through Operation of Act—Whether to be Taken by Heirs in Mobilibus or Heir in Heritage.

The income of a share of residue derived from rents of heritage accumulated by testamentary trustees for a period of twenty-one years after the testator's death, fell at the end of that period into intestacy owing to the combined operation of the Thellusson Act, and the non-existence of anyone having a vested and present right to residue. *Held* that the income fell to be paid to the heirs *in mobilibus* of the testator and not to the heir-at-law.

Logan's Trustees v. *Logan*, 23 R. 848, 33 S.L.R. 638, *followed.*

Succession — Collation inter hæredes — Accumulations Falling into Intestacy through Operation of Thellusson Act — Whether Representative of Heir in Heritage a morte Claiming to Share therein was Bound to Collate.