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

conditions and these were read over to the applicant, and they were there and then signed by him. They are dated 27th January 1921. . . . Before he signed the missives the applicant remarked that the grass and the monthly let of the house were of no use to him, but Mr Russell assured him that things would just go on as they had done before. At the date when the missives were signed both parties were in ignorance of the provisions of the Small Landholders Acts, and neither of them was aware that the applicant might have made a claim for continued possession as a statutory small tenant under the provisions of these statutes. Both, however, knew that they were making a material alteration upon the conditions of the tenancy as previously held by the applicant. No actings of any kind followed upon the missives, except that sometime in July 1921 the landlords altered the entries in the valuation roll so as to make them conform to the conditions of let specified in the missives. The application for an order to find the applicant a landholder or a statutory small tenant was lodged on 9th April 1921. 3. We heard evidence in the case at Kilmarnock on 10th November 1921, but before issuing a judgment we ordered a further hearing for the purpose of giving the parties an opportunity of producing any evidence which might be available on the question whether there had been any actings following upon the missives. No evidence prior to 9th April 1921 was produced, and we did not consider that the alteration of the valuation roll, which was made after the matter had become litigious, was of any effect. On the facts stated we were of opinion that under section 32 (4) of the Small Landholders (Scotland) Act 1911 the applicant was not barred from founding upon his yearly tenancy as constituted at 1st April 1912, but we held that as there could be no determination of the tenancy in the sense of the statute until Whitsunday 1922 we could not pronounce an effective order until that term was bypast. We accordingly pronounced an order finding that at the passing of the Small Landholders (Scotland) Act 1911 the applicant was a yearly tenant, and we continued the cause without prejudice to any pleas which might be competent to the parties in respect of anything that might transpire prior to Whitsunday 1922. . . . Subsequent to Whitsunday 1922 we gave the landlords an opportunity of stating any further pleas, but they intimated they had nothing to add to the contentions formerly advanced on their behalf. We accordingly on 12th July 1922 pronounced a final order finding that the applicant was a statutory small tenant, and renewed his tenancy for three years from Whitsunday 1922 at an agreed-on rent of £7, 4s. 6d. . . . 4. The appellants contend that from 2nd February 1921 the applicant possessed the said house and byre and field under and in virtue of the missives of let dated 27th January 1921, and that he was not entitled to be declared a statutory small tenant within the meaning of the Small Landholders (Scotland) Acts 1886 to 1919. 5. The applicant contends that having been a yearly tenant of the subjects in question, and having from 1st April 1912 resided on and cultivated the holding, he is notwithstanding any agreement to the contrary entitled to an order constituting him a statutory small tenant."

The *question of law* submitted for the opinion of the Court was—"Whether, on the facts stated, the Land Court was entitled to find and declare that the applicant was a statutory small tenant within the meaning of the Small Landholders (Scotland) Acts 1886 to 1919?"

Argued for the appellants—This was a restrictive statute and should be construed in favour of freedom of contract. A provision against contracting-out was common in many statutes. Such provisions, however, struck at agreements excluding the privilege which the statutes conferred. In the present case there was no waiving of the statutory privilege. The tenant was only renouncing the tenancy, and the prohibition of the statute could not extend as far as this. All that was intended was to protect the right of the tenant as to renewal. Otherwise the statute would cut far deeper into contract rights than it was intended to go. It was impossible to say that there was an "agreement to the contrary" in the sense of the statute in the present case merely because the incidental effect as the result of a larger transaction was to destroy the tenant's right to renewal—*Birnie* v. *Fraser*, 1913, 1 S.L.C.R. 94, and *MacCallum* v. *Lindsay*, 1919, 7 S.L.C.R. 82, were referred to.

Argued for the respondent—The agreement contained in the missives was void because the tenant was thereby deprived of his right as a statutory small tenant. The Act was a remedial Act and should be construed liberally. The applicant was thereby vested with the right to apply to the Land Court to determine the terms (the rent and the ish) of the renewal of the tenancy conferred upon him by the statute—*Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, *per* Lord President Dunedin at p. 914, 50 S.L.R. 688. The tenant could not renounce his right to get his rent and tenancy fixed. That was the proper construction of the Act, and if the missives struck at the applicant's right to a continuation of the tenancy, the statute made the agreement null. An analogy was afforded by the case of *Cathcart* v. *Chalmers*, 1911 S.C. (H.L.) 38, 48 S.L.R. 457, where it was held that the clause in the agreement whereby the tenant was deprived of his right was void.

At advising—

LORD JUSTICE-CLERK—This Case is stated by the Land Court, and raises the question whether the respondent Clelland was at the date of his application to that Court a statutory small tenant within the meaning of the Small Landholders (Scotland) Acts 1886 to 1919. The Land Court has answered that question in the affirmative. We are asked by the appellants William Baird & Company to recal that decision and to answer the question in the negative.

The relevant facts which give rise to the

question of law may be briefly stated. The respondent was clearly a statutory small tenant for a long period of time, with a right conferred upon him *vi statuti* to apply to the Land Court to have that fact judicially declared. But it is maintained by the appellants, on whose land the respondent's holding lay, that in virtue of a transaction which took place between him and them in January 1921 the respondent renounced his vested right and ceased to be a statutory small tenant, and that therefore the Land Court was wrong in holding that he was. The nature of the transaction to which I have referred was this—The respondent and the appellants in January 1921 entered into missives whereby the former became a seasonal tenant of the field which he held and a monthly tenant of his house and stable. It is matter of admission that when the missives in question were signed both parties were ignorant of the provisions of the Small Landholders Acts, and were unaware that the respondent might as at that date have made a claim under the statute for continued possession as a statutory small tenant. Despite the missives the respondent on 9th April 1921 applied to the Land Court for an order to determine whether he was a landholder or a statutory small tenant. As neither the respondent nor his predecessors had executed the greater part of the improvements on the holding, the Land Court held that he was not a landholder, but they decided, as I have already indicated, that he was at that date a statutory small tenant.

The decision in the case turns on the construction of section 32 (4) of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49). It is in these terms— "Except in any case where the landlord satisfies the Land Court that there is reasonable ground of objection to a statutory small tenant (hereinafter in this section referred to as the 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." Now the main question which appears to have been litigated before the Land Court was whether within the meaning of that section there had been "any determination of the tenancy." It was, however, admitted in the debate which we heard that that statutory condition had been satisfied, and that the only question which remained was as to the meaning of the words "notwithstanding any agreement to the contrary." The respondent maintained that the missives into which he entered constituted an "agreement to the contrary" in the sense of the section, and that it was accordingly void, while the appellants maintained that an agreement to the contrary must be an agreement the burden of which, as distinguished from the bye-product of which, disabled him from applying for a renewal of his tenancy.

Now in my opinion the purpose of the Act is to secure fixity of tenure to those who satisfy its requirements, and the purpose of the section is to protect a statutory small tenant against himself. Its intention is to secure that in negotiating upon probably unequal terms with the person whose land he holds he shall not bargain away his statutory rights. Under the section any such bargain is voided. In other words, I think that "any agreement to the contrary" means any agreement which disables the tenant from doing what apart from it the section enables him to do. Either the agreement negatives his right or it does not. If it does not, *cadit quæstio*. If it does, then it falls to be disregarded. And I may add that it seems to me anomalous to suggest, as the appellants do, that where a statutory small tenant applies his mind to the matter and deliberately discharges his right the transaction is void, but that where, as here, he has done so by inadvertence he is deprived of the statutory remedy. The distinction appears to me to be fanciful rather than logical.

Apart from the missives of January 1921 the respondent was at the date of his application a statutory small tenant. "For the time being" as well in time past, apart from the missives, he fell within that category, and he was in virtue of the section entitled on the determination of his tenancy—an event which it is conceded had occurred—to a renewal of his tenancy. The only thing that stood in his way was the agreement of January. That being so, I am of opinion that that agreement was an "agreement to the contrary" in the sense of the section, that it was cut down by the statutory provision, that the Land Court was therefore right in declaring the respondent to be a statutory small tenant, and that the question put to us falls to be answered in the affirmative.

LORD ORMIDALE—The answer to the question in this case depends, according to the argument presented by the parties to this Court, on the construction of section 32 (4) of the Small Landholders (Scotland) Act of 1911 (1 and 2 Geo. V, cap. 49), which enacts—[*His Lordship quoted the sub-section*].

It is not disputed that the respondent at the commencement of 1921, and for many years prior thereto, fulfilled the requirements necessary to constitute him a statutory small tenant within the meaning of the Act. His application to the Land Court for an order to be judicially declared a statutory small tenant was presented on 9th April 1921. On 27th January 1921, however, missives were interchanged between him and his landlord whereby he agreed to become as from 2nd February 1921 a monthly tenant of the house and byre on his holding, and a seasonal tenant of the grazing. But for these missives he would at the date of his application have been in possession of his holding as a tenant from year to year and duly entitled to an order from the Land Court. The respondent contends that the missives are covered by the words "notwithstanding any agreement to the contrary," and they therefore do not disentitle him from asking for a renewal of his tenancy. I think this contention is well founded. The

appellants maintain that both the grammar and the sense of the context demonstrate, first, that an agreement can be tabled only by a man who is *de facto* at the time when he presents it possessed of the qualifications of a statutory small tenant, and second, that the agreement struck at by the section is an agreement *simpliciter* not to apply for a renewal of his year to year tenancy. If that were the sound construction, then the respondent would be out of Court, for his entity as a yearly tenant is annihilated by the missives, and they do not in expression instruct merely an agreement not to apply for a renewal of his yearly tenancy. But that, it appears to me, is too narrow a construction of words which in themselves are quite general. The substance and effect of "any agreement," and not merely its form and phraseology, must be considered. In the present case the form of the agreement was, I take it, accidental, for both of the parties, we are told, were at the date of the missives in ignorance of the Landholders Act. Be that as it may, the missives involved an agreement by the tenant not to apply for a renewal of his tenancy on its determination in due course.

Accordingly I agree that the question submitted for the opinion of the Court should be answered in the affirmative.

LORD HUNTER—It is admitted that on the passing of the Small Landholders Act 1911 (1 and 2 Geo. V. cap. 49) the respondent was a yearly tenant under the appellants and entitled to the rights conferred by the Act upon a statutory small tenant. These rights he enjoyed in virtue of the provisions of that Act, and without the necessity of any order from the Land Court. It is equally admitted that he was in enjoyment of these rights in January 1921, at which date the termination of his tenancy was Whitsunday 1921. On 27th January 1921 the respondent signed an offer to take the dwelling-house and byre at a monthly rent of 10s. 8½d., and a separate offer to take the field connected with the house at a seasonal rent of 16s. per annum payable half-yearly in equal proportions at Whitsunday and Martinmas. These offers were accepted by the appellants. The question raised in the present case is as to the effect of these offers upon the respondent's rights under the Small Landholders Act.

By section 32 (4) of that Act it is provided —[*His Lordship quoted the sub-section*].

The present application was made on 9th April 1921, *i.e.*, after the signing of the missives in January of that year, but before the termination in course of time apart from those missives of the respondent's tenancy. According to the view of the Land Court, at the date when the missives were signed both parties were in ignorance of the provisions of the Small Landholders Acts, and neither of them was aware that the applicant might have made a claim for continued possession as a statutory small tenant under the provisions of the statute.

For the appellants it was maintained that the respondent was not entitled to make the application in respect that on 9th April 1921 he was not a statutory small tenant but was possessing under the missives. The answer to this position by the respondent was that the missives could not be founded on, as they constituted an agreement by which he was prevented from making an application under the Act, which is illegal. I think this contention is sound. The position would have been different if apart from the agreement the respondent would have had no right to possess, but in this case it is conceded that but for the missives he would have been entitled to claim a renewal under the statute. I think therefore that the Land Court were entitled to take the course which they did, and that the question put ought to be answered in the affirmative.

LORD ANDERSON—During the debate on this Stated Case I had doubts, which further consideration has not entirely dissipated, that the judgment of the Land Court was not justified by the terms of section 32 (4) of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), under which the question between the parties falls to be determined.

That sub-section in effect confers upon a statutory small tenant an indefeasible right to a renewal of his tenancy when it has come to an end. It seems to postulate, however, that when its provisions are appealed to and a renewal of tenancy demanded, the applicant should possess all the qualifications of a statutory small tenant, including that of being then the possessor of a small holding on a yearly tenancy. It was maintained for the landlords that on 9th April 1921, when the application for an order of renewal of tenancy as a statutory small tenant was lodged, the respondent possessed the subjects not as a yearly tenant but as a monthly tenant as regards the house and as a seasonal tenant as regards the land. The respondent had undoubtedly been a yearly tenant of his holding down to 2nd February 1921, but it was maintained that in virtue of the missives of let referred to in the case his yearly tenancy was then determined and a different tenure was then constituted. The respondent's rejoinder was that this was an "agreement to the contrary" in the sense of the said sub-section which was ineffective in law to deprive him of his statutory vested right to a renewal of the yearly tenancy that had been in force at the time when the said missives were executed. The statutory phrase "any agreement to the contrary" obviously means any agreement contrary to the provisions of the sub-section, that is, any agreement to waive, abandon, or discharge the right to a renewal of yearly tenancy thereby conferred. Such an agreement, according to the sub-section, may be repudiated by "the tenant for the time being," that is, the tenant of the holding at the date when the yearly tenancy was determined. As the respondent was the yearly tenant of the holding on 2nd February 1921, when the missives purported to terminate the yearly tenancy, it is plain that he was entitled to object to the agree-

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