

paid was truly income of the Crown, of which the appellants were merely the collectors. I am unable to accept this suggestion. The interest as well as the principal amount of estate duty are debts payable to the Crown, and the appellants hold no different relationship towards the Crown than they have towards any subject creditor. 3. The last main contention of the appellants was that the policy of the Act of 1918 was to tax only the ultimate recipient of income brought into charge and not specially exempted, and that this implication must be read into the statutory provisions founded on by the Crown. The short answer to this contention is the decision of the Queen's Bench Division in *Alexandria Water Co.*, 11 Q.B.D. 174. This case is binding on us inasmuch as it was considered in the House of Lords, and certainly not discredited, in the case of the *Gresham Life Assurance Society* [1892] A.C. 300.

I am therefore of opinion that the question of law should be answered in the negative.

The Court answered the question stated in the Case in the negative, dismissed the appeal, and affirmed the determination of the Commissioners.

Counsel for the Appellants—Moncrieff, K.C.—Keith. Agents—Webster, Will, & Company, W.S.

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

Friday, November 9.

FIRST DIVISION.

[Exchequer Cause.]

THOMSON & BALFOUR v. INLAND REVENUE.

Revenue—Income Tax—Schedule D—Succession to Trade—Purchase by A of Business belonging to B—Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), Schedule D, Rules Applicable to Cases i and ii, No. 11.

The Income Tax Act 1918, First Schedule, Schedule D, Rules applicable to Cases i and ii, No. 11, provides—"If . . . any person succeeds to a trade . . . the tax payable in respect of . . . the person so succeeding shall be computed according to the profits or gains of the trade . . . during the respective periods prescribed by this Act notwithstanding the . . . succession."

A firm of timber merchants and saw millers purchased from another firm of timber merchants in the same place a saw mill in which the sellers had carried on business up to the time of the sale. The price was fixed at the value of the saw mill and the land, but in the letters which constituted the agreement to sell the goodwill of the sellers' business was included in the price. As

soon as the sale was concluded a joint circular was issued to the public by the purchasers and the sellers, in which the purchasers announced an intention to add to their own business that of the sellers, and the sellers recommended the purchasers to their customers as their "successors." The sellers had at the time of the sale no current orders, and the purchasers were not able to identify any orders received by them as coming from the sellers' customers. No books or lists of customers was taken over by the purchasers, nor were any debts due to or by the sellers transferred, and the purchasers obtained no information from the sellers as to the business previously carried on by the latter or as to the profits earned, and acquired no right of access to the sellers' books whereby the profits could be ascertained. The purchasers transferred their entire office staff to the premises formerly owned by the sellers and carried on their principal business there. The purchasers having been assessed for income tax as having succeeded to the business carried on by the sellers, held that the Commissioners were entitled to hold that the purchasers had succeeded to the sellers' business within the meaning of Rule 11 of Cases i and ii of Schedule D of the Income Tax Act 1918, and to confirm the assessments.

Messrs Thomson & Balfour, Victoria Saw Mills, Bo'ness, appellants, being dissatisfied with a decision of the Commissioners for the Special Purposes of the Income Tax Acts confirming assessments to income tax made upon them in the sums of £9630 and £7567 less allowances for wear and tear for the two years ended 5th April 1923 in respect of the profits of their business, obtained a Case for appeal in which E. le Page, Inspector of Taxes, was respondent.

The Case stated, *inter alia*—"The following facts were admitted or proved:—1. The appellants are an old-established firm, and have for many years carried on business as timber importers and saw millers at the Links Saw Mills, Bo'ness. They had an old but well-equipped saw mill on one side of a road and an extensive yard with shed accommodation on the other side. The business consisted in importing Baltic and American timber and logs and converting the same for sale. 2. Upon the outbreak of the war the dock at Bo'ness was closed by order of the Admiralty, and the appellants were no longer able to import timber except to the extent to which they were able to obtain the same through Leith. In consequence of the war and of the circumstances so attending it the nature of the appellants' trade was changed, and they developed the manufacturing side of their business, principally making huts under contracts for the Government. 3. In January 1916 a very large part of the appellants' mill and plant was destroyed by fire. After the fire the appellants continued to carry on business in the remainder of their premises, and Government contracts for huts were executed by them up to the date of the Armistice. 4.

About half-a-mile away from the appellants' premises at Bo'ness was another saw mill named the Victoria Saw Mills, at which a business in the timber trade was carried on by Messrs Mickel & Company. Messrs Mickel & Company imported timber but not to any substantial amount, and were manufacturing doors, windows, and other articles to be sold to builders. During the war they also made huts and other Government requirements. 5. Early in the year 1919 it was necessary for the appellants in order to resume ordinary trading either to rebuild their saw mill or to acquire new premises. To avoid rebuilding at the then heavy costs negotiations were opened with Messrs Mickel & Company for the purchase of the Victoria Saw Mills, the possibility of such a purchase having already been discussed during the war. Valuations of the buildings, plant, and machinery obtained independently by Messrs Mickel & Company and by the appellants very nearly agreed in an amount at or about £10,000, and the value of the land was taken at £2250. Accordingly Messrs Mickel & Company agreed to sell the mills to the appellants for the sum of £12,000. The agreement for sale was embodied in letters exchanged by the solicitors to the parties, dated respectively 27th and 28th March 1919. [The terms of the letters are set forth *infra*.] 6. A joint circular was issued in April 1919 in the names of the appellants and Messrs Mickel & Company to all local authorities and joiners in Scotland. [The terms of the circulars are set forth *infra*.] 7. At the time when the transfer of the premises took place the whole of the sawmilling industry throughout Scotland was in a state of great depression owing to the cessation of Government orders following on the Armistice in November 1918, and to the fact that the building industry had been to a very large extent diminished or extinguished by the war. No orders whatever were on hand or unexecuted at the Victoria Mills, and work there had ceased although the appellants had many orders to execute. No books or lists of customers were taken over by the appellants. No debts due by or to the firm of Messrs Mickel & Company were transferred to the appellants, and no investigation of any kind was made by the appellants into the business as previously carried on at the Victoria Saw Mills, and no information as to the profits made by Messrs Mickel & Company in the said business was requested by or given to the appellants or is at present in the appellants' possession. The appellants did not consider the business of Messrs Mickel & Company as carried on prior to the war to be of any value. No orders received since the purchase of Messrs Mickel & Company's factory could be identified as orders from previous customers of Messrs Mickel & Company. 8. After the sale took place the premises were put in order by the appellants and adapted for their business. The entire office staff of the appellants was transferred to the Victoria Saw Mills, and their principal business of importing and converting timber for sale was thereafter mainly carried on at that

place and in the yards adjoining. The old works were thereafter used mainly for storage purposes. When work commenced some of the work people previously employed by Messrs Mickel & Company were taken on, but these included none of the clerks, travellers, or anyone interested in the management of Mickel & Company. 9. The assessments appealed against were made by the Inspector of Taxes and allowed by the Special Commissioners under the Income Tax Act 1918, section 123, upon the average of the profits of the business of the appellants, combined with the average of the profits for the relative years made by Messrs Mickel & Company at the Victoria Saw Mills, the appellants being treated as having succeeded to the business previously carried on there by Messrs Mickel & Company. 10. Messrs Mickel & Company and the respondent have declined to give the appellants access to the accounts of Messrs Mickel & Company to obtain the data upon which the assessment in respect of the alleged succession has been made, and the appellants having no right to the same have no means of testing the accuracy of the assessment."

The letters in which the agreement for sale was embodied were in the following terms:—

"Messrs Liddle & Salmon,
Solicitors, Bo'ness, "47 Queen Street,
Edinburgh, 27th March 1919.

"Dears Sirs—On behalf of our client Mr William G. Thomson, sole partner of Messrs Thomson & Balfour, timber merchants, Bo'ness, we hereby offer to purchase from your clients Messrs Robert & F. O. Mickel, Glasgow, the whole subjects known as the Victoria Saw Mills, Bo'ness, with the ground appertaining thereto extending to 4.82 acres or thereby, and the whole buildings, houses, fencing, sidings, machinery, plant, tools, fittings, and fixtures of the said saw mills or in or about the same, including the buildings, machinery, &c., detailed in the inventory by Mr Alexander M'Kendrick of Johnstone, dated 4th March 1919, and that on the following terms:—(1) The price shall be twelve thousand pounds sterling (£12,000). (2) The sellers shall deliver a valid title and searches for incumbrances in both Registers for the prescriptive period showing a clear record. (3) Entry shall be given as soon as the disposition is ready for delivery, when the price will be payable, but in any event not later than Whitsunday 1919. Our client accepts with pleasure the assurance of friendly help on the part of the sellers in developing the business, and it is understood that the goodwill of the present business is included in the price and will be transferred to our client, and that your clients will agree not to carry on or be associated with a similar business in Bo'ness or Grangemouth for a period of five years from the date of the transfer. — We are, yours faithfully, adopted as holograph, J. MILLER THOMSON & Co."

"Bo'ness, 28th March 1919.

"Messrs J. Miller Thomson & Co., W.S.,
47 Queen Street, Edinburgh.
"Dear Sirs—We hereby accept your offer of 27th inst., of which the foregoing is

a copy. — LITTLE & SALMON, for Messrs ROBERT & F. O. MICKEL.”

The joint circular referred to in the Case was in the following terms:—

“THOMSON & BALFOUR,
Timber Importers,
Sawing, Planing, & Moulding Mills.

“Links Saw Mills, Bo'ness.

“Dears Sir(s)—We respectfully inform you that we have taken over the saw mill, joinery works, and yard called the Victoria Saw Mills, Bo'ness, from our friends Messrs Mickel & Coy. We propose to carry on as before the old-established business of timber importers and sawmillers so long associated with our name, and to add to it the important branch of manufactured doors and windows and other joinery which Messrs Mickel & Co. have made a speciality for many years. When the new housing schemes are in full swing we anticipate that contractors will find it both more convenient and more profitable to purchase their requirements in joinery from the factory than to make them in their own shops. Your inquiries and orders will command as always our prompt and careful attention. We take this opportunity of thanking all our friends who have accorded us their support in the past, and we confidently appeal for a continuance and renewal of their goodwill and help in both our new venture and in the old well-trodden path.—Yours faithfully, THOMSON & BALFOUR.”

“Victoria Saw Mills, Bo'ness, April 1919.

“Dear Sirs—We beg to inform you that we have disposed of our works to our friends Messrs Thomson & Balfour, Links Saw Mills, who will continue to carry them on as a saw mill and steam joinery. In this connection we beg to express the wish that the good relations which have existed between our customers and us will be extended to our successors, who from our knowledge of them can be relied upon to give the utmost attention to any business which may be entrusted to them. We would take this opportunity of thanking our customers for the generous support they have given us since the works were established forty years ago.—Yours faithfully, MICKEL & Co.”

The questions of law for the opinion of the Court were—“1. Whether we were entitled, on the facts found, to hold the appellants had succeeded to the trade of Messrs Mickel & Company within the meaning of the statute? 2. Whether, in respect that the appellants had not the material and had no right to get the material to test or verify a substantial portion of the assessments in question and the figures thereof being in dispute, the Commissioners were entitled to confirm the assessment appealed against?”

Argued for the appellants—The appellants had not succeeded to the business of Messrs Mickel & Company in the meaning of Rule 11 of Cases i and ii, Schedule D, of the Income Tax Act 1918. Succession meant that there was a continuation of the business as in the case of changes in a partnership. Here the facts pointed to a complete break in the continuity, the busi-

ness of Messrs Mickel & Company having been really wound up, while the appellants had merely purchased the premises and plant and transferred their own business to them. The reference to goodwill in the agreement meant nothing. The goodwill had no value and the price was for the corporeal assets only. An agreement not to compete did not imply succession, nor was there in this case any importance in the locality or the continuation of the former name of the mills. This case was similar to *Watson Brothers v. Inland Revenue*, 1902, 4 F. 795, 39 S.L.R. 604, the ratio of which should be applied. The circular letter was not issued to the customers of Messrs Mickel & Company although it might have reached some of them, but was sent out broadcast. Further, the fact that the appellants could not obtain and had no right to obtain from Messrs Mickel & Company any information by which they could test the accuracy of the assessments precluded them from being assessed as successors.

Argued for the respondent—The decision of the Commissioners could be reasonably upheld. This was substantially a case of succession. It was clear from the documentary evidence that the appellants had purchased the business of Messrs Mickel & Company. The mere absence of orders was due to the fact that it was a period of transition and did not mean that the goodwill was valueless—*Donalds v. Hodgart's Trustees*, 1893, 21 R. 246, 31 S.L.R. 181. The fact that appellants had no right of access to the books of Messrs Mickel & Company was their own fault and did not affect the question of succession.

LORD PRESIDENT (CLYDE)—Prior to March 1919 there were two wood businesses in Bo'ness, of which one was a sawmilling business belonging to the appellants, and the other was a joinery business (known as the Victoria Saw Mills) belonging to Messrs Mickel & Company. During the war both businesses suffered considerable disturbance, and both appear to have been engaged for a time in the manufacture of huts for the Government. At the conclusion of the war there was a severe depression in the wood trade. Messrs Mickel & Company found themselves without orders, and the appellants found themselves in possession of works which had been seriously damaged by fire in 1916, and would have to be rebuilt before their ordinary business could be resumed. The result was that the appellants arranged to purchase at Whitsunday 1919 the Victoria Saw Mills belonging to Messrs Mickel. Whether it was or was not originally intended in negotiating the bargain to include the goodwill of Messrs Mickel's joinery business I do not know. But it is certain from the terms of the bargain actually concluded that the purchase did include that goodwill, and that the price of £12,000, albeit fixed on a valuation restricted to tangible assets, was a price inclusive of the goodwill.

The question in the case is whether the appellants “succeeded” to Messrs Mickel's

business within the meaning of Rule 11 of Cases i and ii of Schedule D of the Income Tax Act of 1918.

I do not propose to attempt a definition of "succession" in the sense of Rule 11, but it is, I think, safe to say two things about it. In the first place it does not include the accidental acquisition by a trader who continues in business of the custom left by another who goes out of business. A trader might give up or go out of the trade for some reason without attempting to realise or transfer goodwill, and the result of that might be the capture of some custom therefore attached to him by one or more of his competitors who continued to trade. That would not, I think, be a case of "succession" within the meaning of Rule 11. On the other hand—and in the second place—I think the word "succession" does cover any case of the transfer by one trader to another of the right to that benefit which arises from connection and reputation.

The question whether there is or is not in any particular case a "succession" is a question of fact. In the present case one is met at the threshold of the inquiry with the fact that Messrs Mickel's business was bought along with their mills, for the goodwill was expressly included in the subjects sold. Again, there is the fact that as soon as the sale was concluded circulars by both the purchasers and the sellers were issued to the public announcing on the part of the purchasers that it was their intention to add to their own business Messrs Mickel & Company's joinery business, which they describe as a speciality of Messrs Mickel carried on by them for many years, and on the part of the sellers that they hoped the good relations which had existed between their old customers and themselves would be extended to their "successors"—an unfortunate description of the appellants from their present point of view. The sellers added that from their knowledge of the appellants they could be relied upon to give their utmost attention to orders entrusted to them. These two facts are perhaps not conclusive but they are very weighty, for it is impossible for the appellants to say that if Messrs Mickel's connection and reputation had any value they did not acquire the benefit of it. What they do say, and what is found in fact in the very clearly stated Case before us, is this, that at the moment of their acquisition of Messrs Mickel & Company's business there were no current orders, and that they have not been able to identify any orders they have got since Whitsunday 1919 as orders from Messrs Mickel & Company's customers. Those are the two important matters of fact found, for the circumstance that they did not look at the books of Messrs Mickel & Company is nobody's fault but their own. They chose to buy the goodwill without making any inquiry into the records of the business and without getting even a list of customers. But the circumstance that no customer of Messrs Mickel & Company has been successfully traced and identified amongst those giving orders after Whitsunday 1919 does not carry the matter very

far, and it is not inconsistent with the acquisition of a business or goodwill to say that owing to the very disturbed conditions of trade at the time of purchase there were in fact no current orders. Now the matter in issue being one of fact the question which we have to answer is correctly stated in the Case as being "Whether the Commissioners were entitled on the facts found to hold that the appellants had succeeded to the trade of Messrs Mickel & Company within the meaning of the statute?" I am not entitled to criticise the Commissioners' decision unless I think their finding was unwarranted or proceeded on some mistake. I do not think it was by any means unwarranted, and I see no mistake in it.

The appellants complain that they do not have in the form of possession of, or right of access to, Messrs Mickel & Company's books and accounts any means of checking the large addition to the assessment of their taxable income for the years immediately subsequent to their entry to the Victoria Saw Mills, which results from the inclusion in it of the profits of Messrs Mickel & Company's business prior to its transfer to themselves. One would have expected, since the goodwill was included in the purchase, that the appellants would have taken care to satisfy themselves before closing the bargain with regard to the profitable character of the business for some years prior to the transfer. Perhaps it would have been prudent in a case of this kind to make a stipulation with regard to access to the books for the purpose of checking assessments for income tax. But whether that is so or not the purchasers did not do this, and that is their own affair. The fact that they did not do so cannot, to my mind, affect the right of the Inland Revenue to enforce against them the provisions of the Income Tax Act.

On the whole matter therefore it seems to me that the Commissioners were right, and that there are no grounds for this appeal.

LORD SKERRINGTON—Counsel for the appellants failed, in my opinion, to point out any error of law which was committed by the Special Commissioners when they pronounced a finding to the effect that the appellants had succeeded to the trade of Messrs Mickel & Company within the meaning of the statute. Primarily I should say that it is a question of fact whether one trader has succeeded to the business of another, but the question as put to us involves a question of law, viz., whether the Commissioners as reasonable men were entitled to draw the inference that the appellants had succeeded to the business of Messrs Mickel & Company having regard to the whole facts set forth in the case as having been admitted or proved. For my own part I am well satisfied with the view of the matter taken by the Inspector of Taxes, who contended that the documentary evidence was in favour of succession, and that that evidence had not been displaced. Of course that contention does not mean that the documentary evidence should

be considered separately from the other facts, but it means that when one studies the import and effect of the documents, including the contract of purchase and sale and the joint circular which followed thereon, and when one gives due weight to the various facts admitted or proved, it is impossible to affirm that the Commissioners were not entitled, if they thought fit, to pronounce the finding now under appeal. My impression is that the finding was a right one, but it is enough that the Commissioners were entitled to come to that conclusion.

As regards the second question, it is impossible not to sympathise with the position in which the appellants find themselves, but that consideration of hardship has no bearing upon the question of succession.

The result is that we must answer both questions of law in the affirmative.

LORD CULLEN—As the appellants purchased not merely the tangible assets of Messrs Mickel & Company's business, but also the goodwill, with the intention to which they gave effect, as the documents show, of carrying on that business along with their own, it seems to be perfectly clear that they were successors of Messrs Mickel in the sense of the section of the statute here in question, and it appears to me to be nothing to the purpose if they have found that the business connection of Messrs Mickel & Company has not turned out so profitably as it might have done.

LORD SANDS—I concur.

The Court answered both questions of law in the affirmative.

Counsel for the Appellants—Macmillan, K.C.—Keith. Agents—J. Miller Thomson, & Company, W.S.

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

Wednesday, November 14.

FIRST DIVISION.

[Bill Chamber.]

**FERGUSON BUCHANAN v.
DUMBARTON COUNTY COUNCIL.**

Interdict — Interim Interdict — Interim Interdict against Public Authority — Caution — Interim Interdict Refused on Caution — Unemployment (Relief Works) Act 1920 (10 and 11 Geo. V, cap. 57), sec. 2.

A county council having served notices to enter upon lands in terms of the Unemployment (Relief Works) Act 1920, sec. 2, a note of suspension and interdict was brought by certain proprietors. The Lord Ordinary refused interim interdict, which was craved in the note, until the cause had been heard on answer. A reclaiming note was pre-

sented, and thereafter, but before the hearing in the Inner House, answers were lodged. The Court on consideration of the note and answers refused interim interdict *hoc statu*, but that only on condition of the respondents finding caution for any damage the complainers might instruct in consequence of the entry by the respondents on the complainers' lands.

Lieutenant-Colonel George James Ferguson Buchanan of Auchentorlie, Bowling, in the county of Dumbarton, the Littlemill Distillery Company, Bowling, and Admiral John E. Bearcroft, residing at Torwood, Bowling, presented a note of suspension and interdict against the County Council of the County of Dumbarton as the local authority for that area, in which they craved the Court to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents as local authority foresaid, and all persons acting under them or by their authority, from in any way following up or proceeding under certain notices of intention to enter upon land served by the respondents on the complainers. The said notices were served in exercise of the powers given by the Unemployment (Relief Works) Act 1920, sec. 2, in virtue of which the respondents as local authority foresaid proposed to enter on and take possession of certain lands and buildings which they alleged were required for the construction of a new highway intended to connect the Glasgow and Dumbarton Road at a point west of Bowling with the western end of a new road from Anniesland, Glasgow, to Duntocher.

The complainers averred, *inter alia*—"4. The respondents as local authority foresaid proposed by the said notices to enter on and take possession of the following permanent buildings and structures owned by the complainer Lieutenant-Colonel George James Ferguson Buchanan or parts and portions thereof, all as shown on the plan annexed to the notice served upon him, viz.— . . . The respondents also propose by said notices to enter upon and take possession of the following permanent buildings or structures leased by the complainers the Littlemill Distillery Company, viz., . . . and the following permanent buildings or structures leased to the complainer Admiral John E. Bearcroft, viz., . . . The complainers object to the proposed operations of the respondents as being contrary to and in breach of the provisions of section 2 of the foresaid Act of 1920. . . . 10. By the Development and Road Improvement Funds Act 1909, sec. 11 (3), it is provided that where a highway authority are authorised to construct a new road under Part II of that Act the authority may acquire land for the purpose of such construction or improvement, and by sub-section (4) it is provided that for the purpose of purchasing of land by agreement under Part II of said Act by the Road Board or a highway authority the Lands Clauses Acts shall be incorporated with Part II of said Act, except the provisions of those Acts with respect to the purchase and taking of land otherwise than