Wednesday, February 27.

SECOND DIVISION.

INLAND REVENUE *v.* EARL OF HADDINGTON.

(See *Earl of Haddington, Petitioner*, November 27, 1918, 1919 S.C. 727, 56 S.L.R. 460.)

Revenue—Super Tax—Income—Deductions Allowable on Account of Sums Paid out Annually—"Year in which they are Payable"—Finance (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *sec.* 66 (2) (*d*).

The Finance (1909-10) Act 1910, sec. 66 (2) (*d*), enacts—"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."

By antenuptial contract of marriage the heir-apparent of an entailed estate provided an annuity for his widow and made provisions for his younger children payable out of the entailed estate at his death. He died on 12th January 1917, and at his death it was found that, looking to the free rents of the estate, the amount of the annuity and provisions exceeded the amount competent under the Entail Acts. Accordingly by interlocutor dated 27th November 1918 the Court restricted the annuity and provisions to the appropriate amounts. On 24th December 1918 the heir in possession paid to the widow the amount of two years' annuities and to the younger children the amount of two years' interest on the provisions. *Held* that in computing the income of the heir in possession for the purpose of super tax for the year ending 5th April 1920 only one year's annuity and interest fell to be deducted, the remaining year's annuity and interest being proper deductions from his income for the previous year.

The Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), sec. 66 (2) (*d*), enacts—[*Quoted in rubric*].

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on 4th December 1922, for the purpose of hearing appeals, the Right Honourable George Baillie Hamilton, Earl of Haddington (hereinafter called the respondent), appealed against assessments to super tax in the sums of £5151 and £3368 for the years ending 5th April 1919 and 1920 respectively made upon him under the provisions of the Income Tax Acts.

In computing the total income from all sources for the purposes of super tax for the year ending 5th April 1920 the respondent claimed to be allowed to deduct, *inter alia*, certain sums, amounting in all to £3978, 17s.

The Special Commissioners being of opinion that the said sum of £3978, 17s. was a proper deduction for super tax for the year ending 5th April 1920, discharged the assessment for that year.

During the year ending 5th April 1919 the respondent was serving as a member of the military forces of the Crown in connection with the European War, and was entitled for super-tax purposes to the relief granted by section 19 of the Finance Act 1915. The Special Commissioners therefore discharged the assessment for the year ending 5th April 1919.

The Commissioners of Inland Revenue being dissatisfied with the determination of the Special Commissioners required them to state a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Special Commissioners accordingly stated a Case.

[*The following narrative is taken from the opinion of Lord Ormidale infra*]:—"The late Earl of Haddington was heir of entail in possession of certain lands and estates. He died on 11th June 1917. His eldest son Lord Binning, who was his heir-apparent, predeceased him, dying on 12th January of the same year. On the Earl's death he was succeeded as heir of entail in possession by his grandson the respondent. By antenuptial contract of marriage Lord Binning as heir-apparent, with consent of his father, in virtue of and under reference to the Entail Acts, appointed an annuity of £2125 to his wife and provisions in favour of his younger children amounting to £10,000. The deceased Earl had also made provisions in favour of his younger children, and it was found, after the rights of the parties interested had been adjusted, that the free rents would not suffice to provide for Lord Binning's widow an annuity of more than £1627, 14s. 1d., and for his younger children, of whom there were two, a larger sum than £7234, 5s., or £3617, 2s. 6d. to each. Accordingly by interlocutor of 27th November 1918 the Junior Lord Ordinary restricted the annuity and provisions to these sums, and by the same interlocutor granted authority to the respondent to execute bonds and dispositions in security over the entailed lands for the younger children's provisions."

The Case set forth, *inter alia*—"13. On 4th December 1917 the respondent presented a petition to the Court of Session in which he craved the Court to declare that—(1) The said annuity of £2125 to Lady Binning should be restricted to £1627, 14s. 1d.; (2) the said provision of £10,000 for the younger children of Lord Binning (namely, the said Helen Baillie Hamilton and the said Charles William Baillie Hamilton) should be restricted to £7234, 5s.—that is to say, £3617, 2s. 6d. to each of the said two children. The respondent also craved the Court to authorise him to make and execute a bond and disposition in security in favour of each of the said Charles William Baillie Hamilton and Helen Baillie Hamilton for the sum of £3617, 2s. 6d., with interest and corresponding penalties in ordinary form

over the said entailed lands and estates of Tynninghame and others. 14. The said petition was heard by the Junior Lord Ordinary and was advised (by Lord Sands) on 12th September and (by Lord Blackburn) on 27th November 1918, on which latter date an interlocutor was pronounced in terms of the said petition. The interlocutor of 27th November 1918, so far as applicable to the present case, is in the following terms:—'. . . Finds and declares (1) that the annuity of £2125 provided to the said Lady Binning furth of the said entailed lands and estates and rents, profits, and duties thereof under and in terms of the antenuptial contract of marriage entered into between the said Lord and Lady Binning with consents therein mentioned, dated 15th and 20th September and recorded in the Divisions of the General Register of Sasines applicable to the counties of Haddington and Berwick for publication, and also as in the Books of Council and Session for preservation, on 5th October 1892, be and is hereby restricted to the said sum of £1627, 14s. 1d. per annum; and (2) that the provision of £10,000 provided under and in terms of said antenuptial contract of marriage to the said Lord Binning's younger children out of the rent and proceeds of the said entailed lands and estates shall be and is hereby restricted to the said sum of £7234, 5s.: Also finds and declares that in so far as the said annuity of £2125 exceeds the said sum of £1627, 14s. 1d. per annum, and in so far as the said provision of £10,000 in favour of the said Lord Binning's younger children exceeds the said sum of £7234, 5s., the same respectively are null and void and of no force or effect as affecting the said entailed lands and estates or any part thereof, or the petitioner or the heirs of entail succeeding to him therein: Grants warrant to and authorises the petitioner to make and execute . . . (2) a bond and disposition in security or bonds and dispositions in security in favour of the said Charles William Baillie Hamilton and Lady Helen Baillie Hamilton for the sums of £3617, 2s. 6d. each, together amounting to the sum of £7234, 5s., with interest and corresponding penalties in ordinary form over the said entailed lands and estates of Tynninghame and others, other than the mansionhouse, offices, and policies thereof. . . .' 15. On 24th December 1918 the respondent made the following payments:—

To Lady Binning in respect of the said annuity of £1627, 14s. 1d. for two years - - -	£3255 8 4
Two years' interest at 5 per cent. on £3617, 2s. 6d. to the Honourable Charles William Baillie Hamilton	361 14 4
Two years' interest at 5 per cent. on £3617, 2s. 6d. to the Honourable Helen Baillie Hamilton - -	361 14 4
	£3978 17 0

It was contended on behalf of the respondent—(1) That the said sum of £3978, 17s. was not payable until 27th November 1918, when the interlocutor on the petition of the respondent was pronounced by the Court of Session; (2) that the said sum of £3978, 17s. was a proper deduction for super tax for the year ending 5th April 1920; and (3) that the assessment for the year ending 5th April 1920 should be discharged. It was contended on behalf of the appellants —(1) That the annuity of £2125 and the provision of £10,000 were obligations undertaken by Lord Binning in his marriage contract, and that the interlocutor of 27th November 1918 merely restricted these sums in conformity with section 7 of the Entail Provisions Act 1824; (2) that in terms of section 6 of the Entail Amendment (Scotland) Act 1868 the annuity of £1627, 14s. 1d. to Lady Binning and the provision of £7234, 5s. in favour of the younger children became payable at the death of Lord Binning on 12th January 1917, and that interest on the said sum of £7234, 5s. became payable as from the said date; (3) that the sum of £1989, 8s. 6d., being one-half of the said sum £3978, 17s., was payable in the year ending 5th April 1918 and was a proper deduction for super tax for the year ending 5th April 1919; and (4) that the sum of £1989, 8s. 6d., being the remaining half of the said sum of £3978, 17s., was payable in the year ending 5th April 1919 and was a proper deduction for super tax for the year ending 5th April 1920."

The *question of law* for the opinion of the Court was—"Whether the respondent is entitled to deduction of the sum of £3978, 17s. for the year ending 5th April 1920."

Argued for the appellants (Commissioners of Inland Revenue)—The words "of the year in which they are payable" occurring in sec. 66 (2) (*d*) of the Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8) meant the particular year in which the annual sums ought to have been paid, not the year in which they actually were paid. The question in the case was really settled by these authorities—*Paul* v. *Anstruther*, 1864, 2 Macph. (H.L.) 1; *Hard* v. *Anstruther*, 1862, 1 Macph. 14, Ersk. iii, 6, 8. The following Acts were also referred to—Entail Provisions Act 1824 (5 Geo. IV, cap. 87), sec. 7; Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), sec. 6; Finance (1909-10) Act 1910, sec. 66 (2) (*d*); Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 5 (3) (*c*).

Argued for the respondent (Earl of Haddington)—(1) The word "payable" occurring in sec. 66 (2) (*d*) of the Finance (1909-10) Act 1910 was used in a sense midway between the idea of "accruing" and the idea of "paid." It was used in the sense of "capable of being paid," but no claim could have been made for the sums due before the interlocutor was pronounced—Duncan's Entail Procedure, p. 37. Moreover, before payment could be made not only had the amount of the payment to be settled but questions as to competing rights between heirs of provision and the heir-apparent had to be decided. The word "payable" meant "exigible." It meant that the creditor must have not only a *jus crediti* but also a *jus exigendi*—*Hurll* v. *Inland Revenue*, 1923 S.C. 395; *Duncan* v. *Inland Revenue*, 1923 S.C. 388, 60 S.L.R. 226. If the

appellants were right in their contention there would be no way in which the taxpayer could enforce as against the Crown a claim to have an assessment reponed. (2) The provisions of sec. 9 of the Entail Provisions Act 1824 were imported into sec. 6 of the Entail Amendment (Scotland) Act 1868, and accordingly no payment of the provisions granted by an heir-apparent fell to be made until a year after the death of the granter.

At advising—

LORD JUSTICE-CLERK (ALNESS) — This appeal arises out of certain provisions which were made or attempted to be made under the Aberdeen Act by Lord Binning, as heir-apparent to the late Earl of Haddington, in terms of his antenuptial contract of marriage in favour of his widow and children. It appears to me to be unnecessary to rehearse in detail the history of the dispute. Suffice it to say that on 27th November 1918 the Court held that the provisions made by Lord Binning in his marriage contract exceeded the amount authorised by the statute, and by interlocutor sheared off the excess. The question which is now litigated between the Commissioners of Inland Revenue and the present Earl of Haddington, who on 24th December 1918 made payment of the restricted sums fixed by the Court, and who is the respondent in this appeal, is whether he is entitled to deduction for super tax of the sum which he then paid, viz., £3978, 17s. for the year ending 5th April 1920. The Special Commissioners have answered that question in the affirmative, holding that the sum to which I have referred was not payable in the sense of section 66 (2) (*d*) of the Finance Act 1910 until the interlocutor dated 27th November 1918 was pronounced. The Commissioners of Inland Revenue have appealed against that decision.

The sole question in the case accordingly is, When, in the sense of the section in question, was the sum of £3978 payable? The appellants say it became payable as at the date of Lord Binning's death, not as at the date of the interlocutor to which I have referred. In that contention I think they are right. In my view the right of Lord Binning's widow and children to the provisions which he made in his marriage contract in their favour, up to the statutory limit, became exigible on his death. It is true that Lord Binning over-estimated the amount with which the statute empowered him to endow them. But that fact did not affect, in my judgment, the existence or the quality of the right. Neither did it affect the enforceability of that right. Had an action been raised by the beneficiaries under Lord Binning's marriage contract on his death for payment of the provisions settled upon them by him, the only competent defence to that action, in my opinion, would have been enshrined in the time-honoured words "the sum sued for is excessive." Had a creditor of Lord Binning's sought to adjudge the rents of the estate which within his statutory power he had earmarked for the benefit of his widow and children, they could have vindicated their right to these against all comers in virtue of the combined effect of the Act of Parliament and the marriage contract. The dispute as to amount was adventitious; the liability to pay the statutory amount was inherent and implacable.

The contrary view involves that a debt, even though it be statutory in its origin, if disputed, is not payable until it is constituted by decree. It involves that the quality of the right of the beneficiaries depends on the accident that Lord Binning over-estimated the amount which in virtue of that right they were entitled to recover. It involves that despite the statute and despite the marriage contract not one penny was payable to them until the interlocutor of the Court was pronounced. These consequences seem to me extravagant and unwarranted either by principle or authority. The respondent's argument, with all respect, betrays a confusion of thought as to the right to exact payment of a debt, and the adjustment of the amount of that debt which can in the exercise of the right be recovered. All that was required in order that a debt should become payable in this case at Lord Binning's death was the concurrence of the statutory and the conventional provisions. The debt as delimited by the statute, was never in dispute, and was all along exigible. In other words the ultimate amount of the debt as settled by the Court was payable from the date of Lord Binning's death, not from the date of the interlocutor. The aid of the Court was invoked, not because there was any doubt that the statutory debt was payable, but because a question had arisen as to its precise amount. These are two distinct and independent concepts. Holding as I do that the statutory debt was all along payable, and that the adjustment of its amount did not affect either its quality or exigibility, I am of opinion that the question put should be answered in the negative, and I venture to advise your Lordships to reply to it accordingly.

LORD ORMIDALE — [*After the narrative quoted supra*] — In computing his total income from all sources for the purpose of super tax for the year ending 5th April 1920, the respondent claimed to be entitled to deduct the widow's annuity of £1627, 14s. 1d. for two years and two years' interest on the amount of the younger children's provisions — the deductions amounting in all to £3978, 17s. The Commissioners of Inland Revenue do not dispute that the annuity and interest are proper deductions for super tax, but they object to two years' annuity and two years' interest being deducted in the one year 1920, and maintain that one year's annuity and one year's interest fall to be deducted for each of the years 1919 and 1920. The question presented for our opinion is whether the respondent is entitled to deduction of the *cumulo* sum of £3978, 17s. for the year 1920. I agree with your Lordship that the question should be answered in the negative.

The section with reference to which the question has to be considered is section 66 (2) (*d*) of the Finance Act 1910, which is to be found in the Finance Act of 1918 as section 5 (3) (*c*). It is in the following terms:—"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." The respondent relies on the interlocutor of 27th November 1918, and maintains that it was only on that date that the sum of £3978, 17s. became payable. The interlocutor, however, does no more than restrict the amount of the sums payable so as to bring them, in the circumstances that had supervened, into conformity with the provisions of the Aberdeen Act, and does not profess to ascertain or fix at what date they become payable. That date is, in my opinion, to be found in the statutes and marriage contract and is clearly the date of the heir-apparent's death. Mr Aitchison contended that "payable" (in the section) means "exigible." Assuming that to be so, I do not understand how they became "exigible" after the interlocutor, if they were not "exigible" prior thereto. There might have been a question as to amount but none, it seems to me, as to the liability of the respondent—year by year—to pay. The right to the provisions had vested at the death of the heir-apparent. It was further contended that the 9th section of the Aberdeen Act must be read into the later Act of 1868, and that twelve months must elapse before payment could be required. Taking that to be so, the heir died on 12th January 1917, and the year would elapse on 12th January 1918 and the provisions become exigible. That argument does not help the respondent. It seems to me that in each and every year the respondent has been and is under an obligation to pay the widow's annuity and the interest, and that the sums necessary to liquidate this liability are in each year allowable deductions for the year in which the burden is to be met but for no other year. The whole language of the section is repugnant to the idea that burdens referable to several years may be accumulated and then deducted in lump from the income of one year.

LORD HUNTER—In determining the question whether the respondent is liable to pay super tax for the year ending 5th April 1920, the Special Commissioners in calculating the amount of his income for the year 1919, which is the determining year in the calculation, have allowed him certain deductions, the deductions being an annuity to Lady Binning—that is, his mother—of twice her annuity, and deductions in respect of the provisions made by the heir-apparent—his father—upon the estate in favour of younger children of twice the interest upon the sum charged on the estate in favour of those beneficiaries.

The justification for deduction from income with a view to determining the payment of super tax rests upon the provisions of section 66, sub-section (2) (*d*), of the Finance Act 1910. That was the statute which was in operation at the time when the claim for super tax in this case emerged, and its provisions have been practically repeated in the more recent Income Tax Act of 1918. Section 66 is in these terms—[*His Lordship quoted the section*]. It seems to me to be hardly open to argue that what is contemplated by section 66 is other than an annual provision. What has been allowed, however, by way of deduction by the Commissioners in this case is not an annual provision but is two annual provisions, both allowed as deductions from one year's income. For such a course I do not think the terms of the section afford any justification at all. It appears to me extremely difficult to understand how you can have an annual charge which is payable to the extent of twice its amount in one particular year. It would cease then to be an annual charge. It would be something different in its nature, and fall to be described in other language. In so far as the present case is concerned, I agree with your Lordships that it is a mere accident that the ascertainment of the precise amount of the provision was made in a year which necessitated the actual payment by the respondent of a double annuity and double interest upon the provisions in favour of the younger children of the previous heir-apparent. But that does not alter the fact that so far as they are annual payments—and that is the only question with which the provision of this section is concerned—they were payable, not all in the particular year when in fact they were paid, but were payable in two different years, as regards one of the two sums in the way of annuity in the year previous to the year of calculation, and similarly as regards the interest. I find in the provisions of this section no justification whatever for the accumulation of several years' burdens against the income of a particular year. That would appear to me to be a most illogical thing if the statute had so provided, but I find no justification for that suggestion. I therefore think that the question should be answered as your Lordships propose.

LORD ANDERSON—Two factors have to be ascertained in order to determine the proportion of the respondent's income which is liable to super tax for the year ending 5th April 1920—(1) the amount of the respondent's income in the preceding year; (2) the amount of deductions legally allowable from said income. The amount of income was ascertained by the reporter to whom Lord Sands remitted the petition which was presented to him. The amount of deductions allowable from the income is determined by the provisions of section 66 (2) (*d*) of the Finance Act of 1910. The section refers to "annual sums" which may be deducted, and suggests three different dates which may apply to these sums. These are the dates when the sums (1) accrued, (2) became payable, and (3) were paid.

The key to the problem raised by the case seems to me to be found in the use of the singular number in the foresaid section in reference to the period for which deductions are allowable. The section refers to "the year" and "that year." This plainly imports, in my judgment, that the outgoings of any particular year are to be deducted from the incomings of that year. Now in the present case what was done was to deduct the outgoings of two years from the incomings of one year. It is true that the sum of £3978, 17s. was in point of fact "paid out" in 1918, and was deducted from the income of the year 1918-19, but this sum really represents the outgoings of two years, 1917-18 and 1918-19. One-half of this sum was, in my opinion, "payable" in the year 1917-18, because the annuity and interest on children's provisions began to accrue as from the date of the death of Lord Binning. It seems to me, therefore, that the Special Commissioners of Income Tax were wrong in holding that the whole of said sum was not "payable" until 27th November 1918.

The question of law ought therefore to be answered as suggested by your Lordship.

The Court pronounced this interlocutor—

"... Answer the question of law stated in the Case in the negative: Reverse the determination of the Commissioners; and decern. ..."

Counsel for the Appellants — Solicitor-General (Fenton, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Respondent—Henderson, K.C.—Aitchison, K.C.—Thom. Agents—D. & J. Campbell, W.S.

Tuesday, March 4.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GRAHAM *v.* PURVES.

Landlord and Tenant—Removing—Competency—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 *and* 11 *Geo. V, cap.* 17), *sec.* 12 (2)—*Rent and Mortgage Interest (Restrictions) Act* 1923 (13 *and* 14 *Geo. V, cap.* 32), *sec.* 4.

The Rent and Mortgage Interest (Restrictions) Act 1923 provides—Sec. 4—"The following section shall be substituted for section five of the principal Act, namely—No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" certain conditions are complied with.

The Act of Sederunt of 2nd December 1920 regulating proceedings under the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920 provides—"1. Application to the Sheriff under said Act shall be by initial writ under the Sheriff Courts (Scotland) Acts 1907 and 1913. 2. Such application shall be a summary cause in terms of said Sheriff Court Acts, and the procedure shall be as provided in these Acts for summary causes."

Held that the Rent and Mortgage Interest (Restrictions) Acts 1920 and 1923 had not expressly or by implication repealed the right to raise an action of summary ejection at common law in cases to which the Acts applied, though these Acts might provide a complete answer to the action when brought, and that accordingly such an action could competently proceed as an ordinary action.

Sheriff—Ordinary or Summary Cause—Discretion of Sheriff—Applications under the Rent and Mortgage Interest (Restrictions) Acts.

Observed (*per* Lord Hunter) that a Sheriff-Substitute has unfettered discretion to convert an ordinary into a summary cause or a summary into an ordinary cause in all cases where it appears at any stage that the action ought to have been brought in the alternative form.

Mrs Lewis Mary Mackinlay Johnson or Purves, wife of and residing with Frederick Purves, Edinburgh, with the consent and concurrence of her husband, *pursuer*, brought an action against Mrs Isabella Graham, widow, Edinburgh, *defender*, craving the Court to grant warrant to officers of Court summarily to eject the defender and her goods and gear and effects from the dwelling-house and pertinents, No. 214 Newhaven Road, Trinity, Edinburgh, and to make the same void and redd, that the pursuer or others in her name might enter into and peaceably possess and enjoy the same, and to find the defender liable in expenses, and to decern therefor.

In the course of the proceedings in the Sheriff Court objection was taken to the application on the ground that it had not been brought in competent form, inasmuch as although the initial writ and the service following thereon indicated an application in ordinary form, the pursuer's pleadings showed that it was an application under the Rent Restriction Act, and should therefore have taken the form of a summary cause and not that of an ordinary action. To meet this objection the pursuer craved and was given leave to amend her pleadings by deleting the references to the Rent Restriction Act so as to render the action a good application at common law. In particular in condescendence 3 in place of the following averment: "The pursuer is therefore under the necessity of making application under the Rent and Mortgage Interest (Restrictions) Acts 1920 and 1923 to obtain possession of the said dwelling-house"—there was substituted the following statement: "The pursuer therefore reasonably requires the dwelling-house for occupation as a residence for herself along with her husband and family."

In the pleadings as amended it was