curator *ad litem* he had suffered lesion, and that the proceedings should be set aside and a trial of new ordered. But that is not what he asks for. I do not think that we could possibly entertain his request without in the first place remedying the defect of which he has so vehemently complained, by giving him a curator *ad litem*. Our first duty will therefore be to appoint a curator *ad litem*, and if he and the minor can show that the minor has been prejudiced by the want of a curator, we shall then consider what ought to be done. But at present we can do nothing more than appoint a curator.

Lord Deas and Lord Mure concurred.

Lord Shand—I am of the same opinion. The defender's first point is that his tutors and curators ought to have been called as defenders in the usual way, either edictally or personally. But it is admitted that he had no curators, and I cannot see either the necessity or meaning of calling curators in such circumstances. I think, however, that the Sheriff should have appointed a curator *ad litem*, because it is a general rule of our Courts that a minor should have a curator *ad litem* to see that the proceedings in the litigation are properly conducted on his behalf. And I think that this rule leads to two results in this case. In the first place, a curator *ad litem* should be appointed, and, secondly, if it can be shown that in consequence of the failure of the Sheriff to make such an appointment the minor has suffered prejudice, I think the proceedings may be opened up in order that this prejudice may be remedied if possible. I shall only add this further observation, that while it is the general rule that a minor should have a curator *ad litem*, that is not, in my opinion, an absolute rule. For instance, if a minor near majority has been acting as a trader on his own behalf without a curator, I should doubt whether it would be necessary to appoint a curator *ad litem* to him in any litigation arising out of the business in which he was engaged.

The Court appointed the minor's reputed father to be his curator *ad litem*.

Counsel for Appellant — Nevay. Agent — Robert Broatch, Law Agent.
Counsel for Respondent — Mair. Agent — Charles B. Hogg, Solicitor.

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*Thursday, January 8.**

FIRST DIVISION.

[Lord Curriehill, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* THE DUKE OF ABERCORN.

Revenue—Income-Tax—Annuity—5 and 6 Vict. cap. 35, sec. 102.

Section 102 of the Income-tax Act provided that income-tax should be chargeable upon "all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same, by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract."

The section further provided that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment" the amount of such assessment.

Where the seller of certain lands compulsorily taken by a railway company agreed to pay the company annually, during the currency of the leases of the farms of which the lands so taken formed a part, a sum at the rate of 3 per cent. on the price paid by the company to the tenants, the company undertaking to relieve the seller of all claims of damages by the tenants, who were to continue to pay their rents in full—*held* that this annual payment being an annuity payable "as a personal debt or obligation by virtue of a contract," was within the above-quoted enactment, and was payable only under deduction of income-tax.

In 1865 the pursuers, the North British Railway Company, took compulsorily a portion of the estate of Duddingston, belonging to the Duke of Abercorn, who was the defender. The following was the agreement with reference to the tenants' claim for damages for the land so taken:—"(14) This present agreement shall not embrace the claims of tenants either for permanent or temporary damages during their existing leases, which the Company shall settle with the tenants independently of this agreement. But the Marquis of Abercorn agrees to pay towards the tenants' claims for permanent damage during the present leases bank interest not to exceed three per cent. per annum on the gross sums which he may receive from the Company for the land to be permanently occupied by the Company, and intersectional damages, but not upon the sum which may be allowed for deterioration to any adjoining feuing-ground. If any part of the lands to be permanently occupied by the Company shall be paid for as feuing-ground, interest shall be allowed thereon as above, on the agricultural value of £220 per acre, towards the tenants' claims for damages on account of the land to be so occupied by the railway, and the Marquis shall relieve the Company of any claim for intersectional damage at the instance of the tenants in regard to such feuing-ground so occupied by the Company."

A question having arisen between the parties as to whether the price agreed on was intended as the agricultural value only of the subjects, or whether it included a proportion for feuing value in terms of the above agreement, the pursuers maintaining the former alternative, and the defender the latter, this action was raised concluding for implement of the contract of sale by exe-

* Decided 7th January.

cution and delivery of a formal conveyance of the subjects, or for damages.

The pursuers pleaded, *inter alia*—"The annual payments due by the defender to the pursuers not being of the nature of income, annual profits, or gains to them, but simply portions of capital repayable for a certain period by the defender in instalments out of the gross price payable to him by the pursuers, the defender is not entitled under the Income-tax Acts or otherwise to deduct income-tax before paying or crediting the same to the pursuers."

The defender pleaded, *inter alia*—"Under and in respect of the provisions of the 102d and 103d sections of the Statute 5 and 6 Vict. cap. 35, the allowances payable by the defender to the pursuers fall to be paid under deduction of income-tax, and the accounts between the parties ought to be adjusted on that footing."

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor, which, after dealing with the first question in the case relating to the agricultural and feuing value of the subjects in question, proceeded—"Finds (2) that the defender is entitled to deduct income-tax from the foresaid annual allowance or interest, and also from all similar annual allowances or yearly payments on account of tenants' claims made or to be made by the defender to the pursuers in respect of sums paid by the pursuers to the defender for lands taken prior to 1865."

"*Note.*—[*The first part of his Lordship's note related to the first finding in the interlocutor*]—As regards the second question, viz., the right of the defender to deduct income-tax from these annual allowances, I at first felt some difficulty, but after very careful consideration I have come to be of opinion that the defender is entitled to prevail. The mode of settlement adopted by the parties, though not unusual in 1844, was not in conformity with the requirements of the Special Railway Acts of the pursuers, or of the Lands Clauses Consolidation Act of 1845, and it is not now much followed. Under these statutes the rent of the whole farm is to be apportioned between the land taken and the land retained; and the tenant is to retain from the gross rent stipulated in the lease the portion allocated upon the land taken. But in this case the tenant continued to pay to the defender his full rent for the whole farm, and the pursuers undertook to repay to him the proportion of rent which he would otherwise have been entitled to retain from his landlord. And as the allowance to be made by the defender to the pursuers is in part to enable them to repay to the tenant that part of the rent, and as the defender receives the rent only under deduction of the income-tax, it is clear that, to the extent of that part of the allowance at least, he is entitled to deduct the tax. But it is not upon that ground alone that I think the defender is entitled to deduct the tax from his yearly payments. I think he is entitled to make the deduction from the whole allowances, to whatever purpose the pursuers may apply these—(1) because they are in my opinion yearly payments by the defender to the pursuers of the nature contemplated by section 102 of the Income-tax Act (5 and 6 Vict. cap. 35), and chargeable with assessment; and (2) because the payment is made by the defender in circumstances entitling him to retain the assessment. The Act provides that the assessment shall be chargeable upon 'all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same, by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract.' Now, it appears to me that the allowances in question are of the nature of an annuity or annual payment, payable as a personal debt or obligation by the defender under a contract with the pursuers. The Act then provides that 'in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment' the amount of such assessment. Now, the annual payment is made by the defender out of the rent received by him from his tenant, and out of the interest of the prices received by him for the land taken, and as the tax is deducted, or is liable to be deducted, from these annual rents and interests before they are received by the defender, he is, in my opinion, authorised by the statute to make a corresponding deduction from the pursuers. Indeed, from whatever source the defender makes the payments, they are presumably paid by him out of income, all of which is assessed, or liable to be assessed, for the tax, and not out of capital, and are therefore liable to deduction. The pursuers maintain that the allowance is not a yearly payment of the kind contemplated by the statute, but is truly a repayment of a capital sum by instalments, and that such instalments are not liable to be assessed; but they failed to point out what is the capital sum which is thus being repaid, or to satisfy me that the allowance is not truly a yearly payment chargeable with assessment under the statute. I am therefore of opinion that the second question submitted in this case must be answered in favour of the defender."

The pursuers reclaimed.

The arguments sufficiently appear from the opinions of the Court.

At advising—

LORD PRESIDENT—The question here is, whether the Duke of Abercorn in paying the 3 per cent. abatement to the North British Railway is entitled to deduct income-tax. Now, we must see whether the case comes within the provisions of the Income-tax Acts, and particularly within the terms of section 102 of the Income-tax Act (5 and 6 Vict. cap. 35). It is there provided—[*His Lordship quoted the section as above*]. Now, these words are open to construction certainly, but still it appears to me that upon all annuities or other annual payments payable as a personal debt or obligation by virtue of any contract—and I agree with the counsel for the Railway Company that this provision is to be read as meaning other

annual payments of a like nature with annuities —that upon all such payments income-tax is to be deducted. I do not think that there is any great ambiguity in the matter. We were referred to a case in the English Court of Exchequer—*Foley* v. *Fletcher* (3 Hurl. and Nor. 779)—in which the price of lands sold, which was to be paid by yearly instalments, was held not to fall within these words of the Income-tax Act, and I have no intention of expressing any dissent from that judgment, because it is quite justifiable on the footing that the payment there was not a payment of income, interest, or other annual prestation, but was truly a payment of capital. Therefore I shall say no more about that case.

The question is, whether we have here got an annual payment of the nature of an annuity under a contract? What is the nature of the payment here. It is a payment made annually by the Duke of Abercorn so long as a certain lease endures, and received annually by the Railway Company, for the purpose of enabling them to discharge the annual burdens which they undertook to the tenant. The right of the tenant under the Railway Acts is a claim for compensation directly against the landlord; and this claim arises from the consideration that the *vis major* of an Act of Parliament having deprived the tenant of part of what he possessed under the lease, he is entitled to be repaid by the landlord, who has received the price of the lands sold to the Railway Company. Now, if the claim is made directly against the landlord, it just takes the form of an annual deduction from the rent. But in this case the Railway Company say, "Never mind about the deduction. Just take the full rent, and we shall settle with the tenants. Only, to enable us to do so, you must give us an annual deduction during the currency of the lease of 3 per cent. on the price of the lands taken." Now, what was the obligation which the defender thus undertook with the Railway Company? It was an obligation to make an annual payment to the Company to enable them to satisfy the claims of the tenants. If the tenants did not choose to enter into any special agreement, they would of course settle with the Company on the footing of their common law rights; and what they were entitled to apart from any agreement was an annual deduction from the rent so long as the lease endured. There were thus two annual payments—one by the Duke of Abercorn to the Railway Company, and the other by the Railway Company to the tenants. Now, I cannot conceive anything more clearly falling under section 102 of the statute; and it does not appear to me in the least degree to affect the question that the tenants agree to take from the Railway Company a slump sum instead of an annual payment. The payment by the Duke of Abercorn remains an annual payment in discharge of an obligation to the Railway Company just as much as before. It appears to me plain that these abatements were paid as a personal debt or obligation by the Duke of Abercorn to the Railway Company. I therefore agree with the Lord Ordinary.

Lord Deas and Lord Mure concurred.

Lord Shand—The statute includes and specifies as the subject of charge "all annuities or other annual payments . . . payable as a personal debt or obligation by virtue of any contract." These terms directly apply to this annual payment. What was the nature of the transaction between the parties? The proprietor says—"As you undertake to settle all claims by my tenants, and thereby to secure to me my full rents under the current leases, without any deduction for land taken, I shall pay you 3 per cent. annually during the currency of the leases on the price of the land you take." That appears to me to be just a case of an annuity payable by contract, and as such directly within the terms of the statute. It is not at all like *Foley's* case, for there the purchaser was paying off the price—a capital sum—gradually; here he is not. There is no doubt here an arrangement for the settlement of the price, and it was as part of this arrangement that the agreement for an annual payment was made. But the price was wholly paid. There was in fact an over-payment, and it was in respect of this over-payment that the parties contracted that an annuity or annual payment should be made for a certain time.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Lord Advocate (Watson)—Darling. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Defender (Respondent)—Gloag —H. Johnston. Agents—Mackenzie & Kermack, W.S.

Saturday, January 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DRUMMOND (CARSE'S FACTOR) *v.* GILLESPIE (CARSE'S CURATOR) AND OTHERS AND GILLESPIE (CARSE'S CURATOR) *v.* DRUMMOND (CARSE'S FACTOR).

Bills—Promissory-note—Sexennial Prescription—Markings of Payment of Interest by Debtor on Back of Note—Entries in Books of Debtor.

Upon the back of a promissory-note dated in 1833 there were markings of payment of interest in the handwriting of the debtor, dated in 1840, *i.e.*, subsequently to the expiration of six years from the date of the note. Further, in a book kept by the debtor, of his intromissions as factor on the creditor's estate, there were entries of payment of interest up to 1846. *Held* that sufficient evidence was thereby afforded of the existence of the debt, and that when a debt of that nature is thus reared up after the lapse of six years, it remains in force until paid or extinguished by the long negative prescription.

Bills—Vicennial Prescription of Holograph Writs. Observations (*per* Lord Curriehill) upon the operation of the Vicennial Prescription Act (12 Geo. III. cap 72), as affecting bills and relative markings, holograph of the granter, and upon the necessity of pleading the statute upon record in order to entitle a party to a restricted mode of proof.

These actions related to the trust-estate of the late Edward Carse, bootmaker in Musselburgh. The