Thursday, February 4.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

BALFOUR KINNEAR AND OTHERS (BALFOUR'S EXECUTORS) *v.* INLAND REVENUE.

Succession—Heir and Executor—Inland Revenue—Estate Duty—Rent—Apportionment—Apportionment Act 1870 (33 *and* 34 *Vict. cap.* 35), *sec.* 2.

The Apportionment Act 1870 enacts, sec. 2—"From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income . . . shall, like interest on money lent, be considered as accruing from day to day."

A landowner died on 6th June 1907. There was then current a lease for "nineteen years from and after the term of Martinmas 1900, which is hereby declared to be the term of the tenant's entry to the said farm and lands." It was admitted that "by custom . . . entry . . . is given to both houses and lands at 28th November." The rent was payable on 15th May and 11th November in each year.

A question having arisen between the executors and the Inland Revenue as to estate duty, *held* that the part of the current rent which fell to be apportioned to the executors ran from 15th May and not from 28th May.

"The question has nothing to do with the period of possession. The two factors which we require to consider are simply the date when the last periodical payment became due and payable, and the date at which the landowner died."—*per* Lord Kinnear.

George Thomas Balfour Kinnear, W.S., and others, the executors of Colonel James William Balfour of Balfour and Trenaby, having claimed repayment of a certain amount of estate duty, and their claim having been refused, brought an appeal in the Sheriff Court at Edinburgh against the Commissioners of Inland Revenue. The initial writ stated that the claim or demand of the pursuers was "for repayment of the sum of £11 of estate duty overpaid by them upon the rents vested in the said deceased James William Balfour at the date of his death on 6th June 1907, together with interest thereon at the rate of 3 per cent. per annum from said date till paid. In giving up the inventory of said deceased's estate, the pursuers erroneously calculated and included the proportion of rents from 15th May—instead of from 28th May—to 6th June 1907, and thus paid estate duty on £201, 16s. 4d., or say £200 of rents, at the rate of 5½ per cent., equal to £11, which should not have been paid."

A sample lease was produced. It, referred to as No. 11 of process, contained these clauses—"And that for the space of nineteen years from and after the term of Martinmas 1900, which is hereby declared to be the term of the tenant's entry to the said farm and lands hereby let, notwithstanding the date or dates hereof, and from thenceforth to be peaceably occupied and possessed by the tenant during the whole foresaid space. . . . For which causes and on the other part the said Peter Maxwell binds and obliges himself, and his heirs, executors, and representatives, all conjunctly and severally, without the necessity of discussing them in their order, to make payment to the said Colonel James William Balfour and his foresaids, or his or their factor or agent for the time, at the usual place of collection of the rents of said estate, of the sum of £120 sterling yearly in name of rent or tack-duty, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of Whitsunday 1901 and the next term's payment at Martinmas thereafter, and these in full of the rent for crop 1901, and the possession from Martinmas 1900 to Martinmas 1901, and so on half-yearly, termly, and proportionately thereafter during this tack, with a fifth part more of each term's payment of liquidate penalty in case of failure and interest of the said rents at the rate of £5 per centum per annum from the said term of payment until paid."

Joint minutes of admissions admitted—"(1) By custom under a lease, of which No. 11 of process may be taken as a sample, entry, notwithstanding the terms thereof, is given to both houses and lands at 28th November. (3) The rents were due and payable on 15th May and 11th November in each year."

On 19th October 1908 the Sheriff-Substitute (GUY) refused the appeal, found the appellants liable to the respondents in expenses, and remitted to the Auditor of Court to tax the same (allowing fees to counsel) and to report.

Note.—"I take it that the joint-minute of admissions lodged by the parties amounts to a renunciation of probation, although parties have not formally renounced probation, and there seems to be nothing left for probation.

"The question between the parties, shortly stated, is this. The deceased Mr Balfour died on 6th June 1907, and in the settlement with the respondents for estate duty the appellants, his executors, paid on the footing that rents of heritable properties that belonged to the deceased and were let from Martinmas to Martinmas accrued from the legal term, and not from the terms of removal. I think this view was the sound view, and is in accordance with authority (see *Campbell*, 11 D. 1426, and *Blaikie*, 11 D. 1456). In my view, apportionment of rents in a question such as the present ought to be decided as and from the legal terms and not the conventional or statutory removal terms. These latter are not, properly speaking, terms at all, but days of convenience in some respects for the tenant, but primarily for the landlord. If any other view were taken it would result in this, that the apportion-

ment of rent would be dealt with in one way, and the apportionment of all burdens upon the same property, such as feu-duty, ground-annual, interest on heritable bonds, and rates and taxes, would be determined in another way.

"The appellants' argument seems to have been founded to some extent upon the decisions in *Thomson* v. *Barclay*, 10 R. 694, and *Sawers* v. *Kinnair*, 25 R. 45. I think these cases have no bearing on the present question, and if I may humbly state my opinion I think the judgment in these cases is erroneous, in respect that the fact seems to have been entirely left out of account that in a lease over a number of years the obligation for rent must be continuous, and so far as I know the law of Scotland, whenever the obligation for rent continues landlords' hypothec exists, at all events in these cases where landlords' hypothec has not been abolished."

The pursuers appealed to the Court of Session, and argued—The apportionable period was from 28th May to 6th June 1907. Assuming they were wrong in taking the 28th May 1907, then the apportionable period was from 28th November 1906 to 6th June 1907. Rent should be apportioned according to the period of possession for which it was the consideration—*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694, 20 S.L.R. 440; *Sawers* v. *Kinnair*, November 4, 1897, 25 R. 45, 35 S.L.R. 85; *Campbell* v. *Campbell and Others*, July 18, 1849, 11 D. 1426, Lord Ivory at 1433, L.J.-C. Hope at 1442, Lord Wood at 1445; *Blaikie* v. *Farquharson*, July 18, 1849, 11 D. 1456; *Hutchison* v. *Spencer*, June 14, 1889, 5 S.L.Rev. 399 (decided by Lord Pearson when Sheriff); *The Swansea Bank, Limited* v. *Thomas*, 1879, L.R., 4 Ex. Div. 94. If possession were not regarded, then the interpretation put on the Titles to Land Consolidation Act 1868, sec. 8, in *Mackenzie's Trustees* v. *Somerville*, July 17, 1900, 2 F. 1278, by Lord Kyllachy at 1281, and Lord Adam at 1285, 37 S.L.R. 953, was inaccurate, for the second condition there referred to, viz., possession, would have been unnecessary. That section was also considered in *Wigan* v. *Cripps*, 1908 S.C. 394, 45 S.L.R. 295. The Act 1690, cap. 98 (cap. 39 of duodecimo edn.), was repealed by the Statute Law Revision Act 1906 (6 Edw. VII, cap. 38). The Act 1693, cap. 24, dealt only with Whitsunday.

Argued for the defenders (respondents)—The question of possession was irrelevant. The legal term of Whitsunday was alone to be looked to—*Campbell* v. *Campbell* (*cit. sup.*), especially Lord Ivory at 11 D., p. 1432, Lord Wood at p. 1445, Lord President Boyle at p. 1451, Lord Fullerton at p. 1453; *Blaikie* v. *Farquharson* (*cit. sup.*); Bell's Principles, sec. 1499; *Wigan* v. *Cripps* (*cit. sup.*), Lord Low at 1908 S.C., p. 400-401. On surviving 15th May one half-year's rent vested in Colonel Balfour. Thereafter the rent was accruing from day to day. For entry to houses Whitsunday was, by the Removal Terms (Scotland) Act 1886 (49 and 50 Vict. cap. 50), sec. 4, 28th May. For all other purposes, except contracts of service, it was 15th May—Act 1690, cap. 39; Act 1693, cap. 24.

At advising—

LORD PRESIDENT—The question here is raised between the executors of the late Colonel James William Balfour and the Crown as to estate duty. It deals, technically speaking, with a sum of £11, but it raises an important general question.

The late Colonel Balfour died upon 6th June 1907, and at the time of his death there were various leases current, of which we have been given one as a sample. That lease bore to be "for the space of 19 years from and after the term of Martinmas 1900, which is hereby declared to be the term of the tenant's entry to the said farm and lands;" and the tenant binds himself to pay "the sum of £120 sterling yearly in name of rent or tack duty, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of Whitsunday 1901 and the next term's payment at Martinmas thereafter, and these in full of the rent for crop 1901 and the possession from Martinmas 1900 to Martinmas 1901."

Now it is matter of admission that these rents were payable as said in this lease, but it is also matter of admission that "entry, notwithstanding the terms thereof, was given to both houses and lands at 28th November." Now estate duty of course has to be paid on the rents which belong to the executor, and the point arises under the Apportionment Act. The estate duties were demanded and paid to the Crown upon the footing that the part of the rent apportioned to the executor ran from the 15th May, the legal term, to the 6th June, the date of Colonel Balfour's death. But the contention upon the other side is that that is wrong, and that the apportioned part ran from the real term of entry, namely, 28th May, to the 6th June, and accordingly this action is raised by the executors for repayment of duty which they say has been so overpaid.

The case was raised under the provisions of the statute before the Commissioners of Inland Revenue. An appeal was taken to the Sheriff, who has refused the appeal and sustained the contention of the Crown, and now an appeal is taken to your Lordships against that judgment.

I think that the judgment of the learned Sheriff is right, and I cannot help thinking that the appellants here have really attempted to bring in matters which have nothing to do with the question. The decision of course must really turn upon what is the true meaning of the clause in the Apportionment Act. Now clause 2 in the Apportionment Act of 1870 provides that "from and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income . . . shall, like interest on money lent, be considered as accruing from day to day." Now I think that this is best tested by considering, first of all, what would have been the result under the old law before the Apportionment Act was

passed. The person in possession had to survive the legal term, and if he did survive the legal term, all the rents then due and exigible became *in bonis* of him, and no one could get anything back from him after it had once passed into his pocket. But if he did not survive until the next term, all of what might be called the inchoate rent did not belong to his executor but went to the heir. Well then, the Apportionment Act changed that, and said, in terms, that like interest on money lent, rent shall be considered as accruing from day to day. That expression seems to me to be perfectly clear. The moment that you come to a concluded period, that period is gone and done with; but then the moment you have passed that period the new period begins to run, and that period is to be apportioned from day to day.

Accordingly it seems to me that when you come to 15th May 1907 there was no question but that then all rent due and exigible at that period passed into the deceased's man's pocket, and, I think necessarily, from that period there started another which ran from day to day, and therefore was properly calculated from the legal term. The question ought not, I think, to be complicated with any of those questions of possession to which appeal has been made in other cases dealing, for instance, with landlord's hypothec.

I confess that I think the question, although not in terms, yet really was decided by the old case of *Campbell*, in 11 Dunlop, where, although the question actually decided was different, they did have incidentally to consider whether a conventional term of entry made any difference, and Lord Ivory upon page 1432 of that case says this—"The only matter really worthy of consideration, in regard to this view of the question as arising at common law, is whether there be anything in the specialty of the tenant's having entered into possession at Whitsunday old style instead of Whitsunday new style, to take the case out of the general rule? And I am of opinion there is not. Clearly it is so as to the rent conventionally payable at Whitsunday 1846; for that was the rent legally due and vested at the previous term of Martinmas, at which term—whether the old or the new style be regarded—the late Lochnell was unquestionably, and for long afterwards, the only party interested, as proprietor, either in the estate or its fruits. But I hold it not less clear as to the rent conventionally payable at Martinmas 1846, for that again was the rent legally due and vested at the previous term of Whitsunday." Now, that I think can be applied directly to the present case, although there it was used in a different way. I think the decision of the case really depends upon this consideration, that whatever may be the arrangements as to entry, whatever the arrangements as to conventional payment, there is always a real term of payment at which the rent becomes due and exigible, and as soon as one term is done another term begins. And therefore all you have got to do is to get to the last term, because as soon as the unapportionable term arrives the rent then due passed into the pocket of the deceased man himself or passed to his executors (as would be the case where rents were postponed) and then immediately you get a new term —the apportionable term—running from day to day from the end of the last.

Accordingly I think the decision of the Commissioners and of the Sheriff here was quite right.

LORD M'LAREN—The difficulty in this case consists in formulating the conditions of the question to be argued, because when these are clearly stated, it is at once seen that there can be only one answer to the question. Now one condition is that, while under ancient usage there were various local terms of removal, different in different counties and sometimes even in different towns within the same county, as a matter of convenience it was thought proper to provide by Act of Parliament for one term of removal—a fixed term. This, of course, would only apply to houses, or houses and pasture, because removal from arable land must always depend upon the time when the crop can be carried away. Now that Act of Parliament, if it made any infringement of personal rights, affected nobody's right except the tenant's —one tenant got in a little earlier than he would have done under local custom, and the other went out a little later, or it might be the other way. It made no difference to the landlord's right which was to receive rent at the legal terms of 15th May and 11th November.

Now this question under the Apportionment Act is a question as to the apportionment of the landlord's right, and I am really incapable of understanding how the tenant's term of entry can have any relation to this question at all. I agree with your Lordship that when you start with a legal term in the lifetime of the deceased person and see that his claims have been satisfied up to that term, the apportionable term is then the term that is current at his death, and the provisions of the Apportionment Act are such that for that term the rights of the executor and of the heir are regulated by the number of days respectively in which the estate has been enjoyed by the ancestor who has died and the heir who survives. I therefore agree with your Lordship that the term is apportionable as from a period commencing on 15th May.

To show the impossibility of working out a different position, it might be that the rent was payable quarterly—there are some old leases where that is done. How are you to find the period of apportionment for these terms? Or again in the case of an arable farm, the term of entry only relates to the house; the entry to the lands is always dependent upon the harvesting of the crop on the ground, which is an indefinite period. I therefore agree with your Lordship.

LORD KINNEAR—I am of the same opinion, and I think with your Lordship that the application of the Apportionment

Act of 1870 is perfectly simple when we keep in view what was the common law as to the position of the landowner and his representatives before the introduction of the first Apportionment Act of William IV. It was perfectly settled law that all rents payable at a term which arrived during a landowner's life vested in him at that term, and being due and payable at a term in his life—whether they were collected or not at that term—were *in bonis* of him, and if he died between that term and the next they passed to his executors. But then his beneficial ownership ceased altogether with his death, and therefore rents which became payable after his death passed away from him and his representatives altogether and went to the next heir, although he might have survived for a considerable portion of the period during which those rents might be supposed to have been growing. The purpose of the Apportionment Act was to put an end to that inconvenience and to give the landowner and his representatives an interest in the rents which were becoming due during the whole course of his life.

The question which was raised upon the construction of the first Act, in the cases of *Campbell* and *Blaikie*, I agree with your Lordship, was very much the same question as that which is raised now, and the decisions are very much in point. But it was a more difficult question because of the language in which the Act was expressed, and also because the statute provided no criterion for ascertaining the period during which the unpaid rents were accruing. The question under the new Act is much simpler, but neither the new Act nor the old one made any difference whatever upon the old common law—that the rents payable at a term arriving during the landowner's life vested in him and on his death belonged to his executors.

Well, then, the Apportionment Act says that all rents and all periodical payments of the same kind shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable. Nothing to my mind can be clearer than the operation of that enactment. When one periodical payment has been made at one term of payment, the next periodical payment is to be deemed to be accruing day by day and the whole is to be apportionable between the heir and the executor accordingly; and therefore on every day during which the landowner survives one term, the proportion of the rent which is payable at the next term is accruing due to him. Now, the state of facts to which we have to apply that enactment appears to me to be quite clearly established by the minute of parties. It is admitted that the rents were due and payable on the 15th May and the 11th November in each year. The rents due and payable on the 15th May belonged to the late Colonel Balfour and passed to his heirs at common law. The rent which became payable on the 11th November is to be considered as accruing due to him day by day during every day that he survived the 15th of May, and the whole of that portion of the rent therefore belongs to his executors. I agree that the Terms of Removal Act has no bearing upon the question, and I think that the admitted fact that entry was given under the lease in question on the 28th November has just as little bearing. The question has nothing to do with the period of possession. The two factors which we require to consider are simply the date when the last periodical payment became due and payable, and the date at which the landowner died. It is altogether irrelevant to consider whether the rent which became payable at the term of Whitsunday related to one period of possession or another. That is not touched by the statute. A very useful illustration of the operation of the Act is to be found in the case of *Lord Herries* v. *Maxwell*, where the question was whether forehand rents were apportionable under the statute, and it was argued that inasmuch as the forehand rent was payable for a crop which was not growing until after the death of the deceased landowner whose death gave rise to the question of apportionment, there was no apportionable rent during his life at all. The answer was that the Apportionment Act had nothing to do with periods of possession, or with the relation of rent either to crop or possession, but was a clear enactment that everything payable in the nature of income was to be considered as accruing from day to day, and as such apportionable. And therefore everything payable at the Martinmas after the death of the deceased was to be considered as growing due day by day from the preceding Whitsunday, and was accordingly apportionable between heir and executor.

I agree with the learned Sheriff-Substitute that the cases cited in his note have no bearing upon the question. If they had been applicable they would have been decisions binding upon this Court as well as upon the Sheriff Court, and they are of too high authority to be lightly called in question. But I rather think that, if the Sheriff-Substitute had correctly understood the case of *Thamson* v. *Barclay*, which has nothing to do with leases extending over a number of years, he would have seen that it was even more remote from the point which he was deciding than he supposed it to be.

On the whole matter I think that this judgment is right, and that we should affirm it.

LORD PEARSON—I am of the some opinion.

The Court affirmed the Sheriff-Substitute's interlocutor dated 19th October 1908.

Counsel for the Pursuers (Appellants)—Clyde, K.C.—Hon. W. Watson. Agents—Hamilton, Kinnear, & Beatson W.S.

Counsel for the Defenders (Respondents)—Solicitor-General (Ure, K.C.)—Umpherston. Agent—Philip J. Hamilton Grierson, Solicitor for Inland Revenue.