tained in the declaration to produce that result was affirmed in the recent case of *Wingate* (1921 S.C. 857), which followed the first part of the case of *Rose's Trustees*, 1916 S.C. 827.

The testator's settlement, however, does not leave the matter there. It goes on to provide that if the widow or any of the children claim their legal rights "he or she shall forfeit all his or her right, interest, and benefit under these presents; and further, all right, interest, and benefit under these presents which would otherwise have been taken by the issue of any child claiming legitim shall also be forfeited — all of which forfeited rights, interests, and benefits shall thereupon accresce to the other beneficiaries or beneficiary accepting these presents." As, however, all the beneficiaries had repudiated their conventional provisions (or had had them repudiated on their behalf) there was no one who could benefit by this forfeiture. The testator's sons accordingly claim that the balance of the estate fell into intestacy, and maintain that it should now be divided between them.

The question of the effect of a forfeiture clause of this kind was the subject of consideration in the case of *Gillies* v. *Gillies's Trustees*, 8 R. 405. It was there decided, in circumstances very similar to those of the present case, that where the testator's sole surviving child, a daughter, had claimed legitim — thereby finally discharging the whole conventional provisions of the settlement in favour of children—an added clause of forfeiture (applying to the interests both of children and of children's issue) in favour of other children who elected to abide by the settlement failed of effect, on the ground that there were no such children, and that accordingly the daughter's rights as heir *ab intestato* were liable to exclusion by her issue should she have any. No challenge of this decision has been made in the present case, and it is therefore one which it is proper for us to follow in practically identical circumstances. The clause of forfeiture must therefore be left out of account, and the question decided as if the testator had contented himself with the declaration that the conventional provisions he left to his children should be in full discharge of their rights of legitim. In short, the rights of the testator's sons' issue who may survive the period of division must be protected by the trust.

In these circumstances it is impossible that any immediate division of the estate should take place, or that effect can be given to the argument that a case of intestacy has occurred, bringing the estate to the two sons as heirs *ab intestato* of their father, for nobody can tell until the testator's widow dies whether there may not be in existence either the present grandchild or future grandchildren whose rights under the settlement remain unaffected. It seems to me therefore that we have no alternative but to answer the question of law in the negative.

LORD SKERRINGTON — I think that the case is ruled by the authority of the decision in the case of *Gillies* (8 R. 505), and I concur in the judgment which your Lordship proposes.

LORD CULLEN—I also agree with the conclusion to which your Lordship has come that the case is ruled by the decision in the case of *Gillies*, 8 R. 505. Mr Burnet advanced a separate argument to the effect that the period of vesting has been accelerated by the widow having claimed her legal rights and surrendered her liferent, but I am afraid that that argument is sufficiently met by the decision in the case of *Muirhead*, 17 R. (H.L.) 45.

LORD SANDS—I agree that this case is covered by the case of *Gillies*, 8 R. 505.

The Court answered the question of law in the negative.

Counsel for First and Third Parties — Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for Second Parties — Burnet. Agent—W. C. Dick, S.S.C.

Saturday, March 15.

SECOND DIVISION.

INLAND REVENUE *v.* HAY.

Revenue—Income Tax—Super Tax—Deductions — Interest on Advances — Advances and Rate of Interest Fluctuating in Amount — "Yearly Interest" — Income Tax Act 1918 (8 and 9 *Geo. V, cap.* 40), *sec.* 27 (1).

The Income Tax Act 1918, sec. 27 (1) enacts—"Any person who claims exemption, abatement, or relief under the preceding provisions of this part of this Act, shall . . . deliver to the assessor of the parish in which he resides a notice of his claim, together with a declaration and statement in the prescribed form signed by him, setting forth—"(*a*) All the particular sources from which his income arises, and the particular amount arising from each source; (*b*) all particulars of any yearly interest or other annual payments reserved or charged thereon, whereby his income is or may be diminished. . . ."

A landed proprietor obtained advances from his solicitors in connection with the purchase and sale of some estates. The advances continued in existence for a period of years, although the actual amount of the advances varied. The solicitors charged interest upon the advances at the rate charged by the Scottish banks on overdraft accounts, the rate fluctuating with the bank rate. This was matter of agreement between the parties, although the agreement was not reduced to writing. The borrower's income was collected by the solicitors, and reductions of the advances were made out of this income from time

to time, as well as out of the proceeds of sale of part of the estates. The interest was charged to the borrower annually on 31st July and debited to his account. In computing the amount of interest the solicitors made the appropriate deduction for income tax. This interest was treated in the hands of the solicitors as having suffered income tax, and was not again charged to income tax in their hands. *Held* that the interest was "yearly interest" charged on the income of the borrower, which he was entitled to deduct in computing his income for the purpose of super tax.

The Commissioners of Inland Revenue, *appellants*, being dissatisfied with the decision of the Commissioners for the Special Purposes of the Income Tax Acts in an appeal by Sir Duncan Edwyn Hay of Haystoun, Baronet, *respondent*, against an assessment to super tax on the sum of £3951 for the year ending 5th April 1923, appealed by Stated Case.

The Case set forth, *inter alia*—"The sole question before us on the appeal was whether certain interest, amounting to £550, 12s., was admissible as a deduction in computing the respondent's total income for the purpose of assessment to super tax. 1. The following *facts* were admitted or proved:—(1) The respondent had obtained advances from his solicitors in connection with the purchase and sale of some estates. These advances had been in existence continuously since the year 1919. The amount of the advances fluctuated from time to time, and the maximum and minimum amounts due to the solicitors in the four years to the 31st July 1922 were as follows—

	Maximum amount due.	Minimum amount due.
Year to 31st July 1919 .	7096	—
Year to 31st July 1920 .	8784	6415
Year to 31st July 1921 .	10,681	7180
Year to 31st July 1922 .	10,700	9378

There was no fixed maximum to the amount of the advances, the limit being a matter of arrangement between the respondent and his solicitors. (2) Interest was charged on these advances at the rate charged by the Scottish banks on overdraft accounts, the rate fluctuating with the bank rate. There was no written agreement relating to these advances, nor was any security given. The respondent's solicitors, however, held for safe custody documents of title of a part of his property. (3) The respondent's income is collected by the solicitors, and reductions of the advances are made out of this income from time to time, as well as out of the proceeds of sale of part of the estates. The interest is charged to the respondent annually on the 31st July and debited to his account. In computing the amount of interest the solicitors make the appropriate deduction for income tax. This interest is treated in the hands of the solicitors as having suffered income tax, and is not again charged to income tax in their hands. 2. It was contended on behalf of the respondent that the loan being a continuing one and the interest paid annually, the interest in question was annual interest and admissible as a deduction in computing his income for the purposes of super tax in the same way as it had been allowed as a deduction for income tax. 3. It was contended on behalf of the Commissioners of Inland Revenue—(1) That there was no evidence that the interest was paid out of revenue or that any interest had been paid at all, (2) that the said interest was not a charge on the respondent's income, and (3) that in any event as all the *indicia* of annual interest were wanting, this interest was not an admissible deduction in computing the respondent's income for the purpose of super tax. 4. Reference was made to the following cases:—*Bebb* v. *Bunny*, 1854, 1 Kay & J. 216; *Farmer* v. *Scottish North American Trust, Limited*, [1912] A.C. 118; *Gateshead Corporation* v. *Lumsden*, [1914] 2 K.B. 883; *Earl Howe* v. *Commissioners of Inland Revenue*, [1919] 2 K.B. 336; *Stocker* v. *Commissioners of Inland Revenue*, [1919] 2 K.B. 702. 5. Having considered the facts and arguments, I, the undersigned J. Jacob, was of opinion that the interest was not annual interest and was inadmissible as a deduction, while I, the undersigned W. J. Braithwaite, found that the advances of money were made under an agreement which the parties treated and intended to treat as a continuing one to endure from year to year, and the interest was therefore in my opinion annual in its nature and admissible as a deduction. There being this difference of opinion between us, I, the undersigned J. Jacob, withdrew my opinion, so that as in other similar cases of opinion before the Special Commissioners the decision might be given in favour of the taxpayer. We both accordingly concurred in allowing the deduction, and giving effect to the other agreed adjustments we reduced the assessment to the sum of £2633."

The *question of law* was—"Whether the said interest is admissible as a deduction in computing the respondent's income for the purpose of assessment to super tax?"

Argued for the appellants—1. *With regard to the appellants' third contention stated in the Case*—Both the amount of the loan and the rate of interest on it fluctuated. Interest on a mortgage might be "yearly interest" even although the period of currency was shorter than a year, because the true character of a mortgage was that of a permanent investment, but interest on a loan such as the present, which was payable on demand, was not yearly interest. The loan was not properly a loan at all. There was no arrangement *de non petendo*, and at any time the solicitors could recoup themselves out of the income of their client and the proceeds of sale of lands. The position of the solicitors was the same as that of a banker, but it required the provisions of section 36 of the Income Tax Act 1918 to enable the banker's customer to obtain repayment of tax on the interest paid—*Mosse* v. *Salt*, 1863, 32 Bevan 269; Dowell's Income Laws (8th ed.), p. 381; *Dunn* v. *Chambers*, 1898, 25 R. 688, *per* Lord M'Laren at 25 R. 689, 35 S.L.R. 537; *Goslings & Sharpe* v. *Blake*, 1889, 23 Q.B.D. 324, *per*

Lord Esher, M.R., at p. 327, and Lindley, L.J., at p. 330; *Leeds Building Society* v. *Mallandaine*, 1897, 3 Tax Cas. 577, *per* Wills, J., at p. 585; *Scottish North American Trust, Limited* v. *Inland Revenue*, 1910 S.C. 966, *per* Lord Johnston at 1910 S.C. 973, 47 S.L.R. 832, *affd* 1912 S.C. (H.L.) 26, *per* Lord Atkinson at 1912 S.C. (H.L.) 28, 49 S.L.R. 114; *Gateshead Corporation* v. *Lumsden*, [1914] 2 K.B. 883, *per* Lord Sumner at pp. 887 and 888; *Garston Overseers* v. *Carlisle*, [1915] 3 K.B. 381, *per* Rowlatt, J., at p. 385; Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), secs. 5 (3) (*c*), 27 (1), 36, 207, and 209, General Rule 19 (1), Fifth Schedule xvii. *With regard to the appellants' second contention stated in the Case*—Even assuming that the interest was "yearly interest," it was not "charged" on the respondent's income. It was paid in part out of capital sums coming into the account—*Earl Howe* v. *Inland Revenue Commissioners*, [1919] 2 K.B. 336, *per* Warrington, L.J., at p. 348. 3. *With regard to the appellants' first contention stated in the Case*—There was no statement in the Case that the interest was actually paid out of the respondent's income in the year in question or since.

Argued for the respondents—The interest was "yearly interest," which was "charged" on the respondents' income, and which he was entitled to deduct. The loan was not a short loan. It had a tract of future time —*Bebb* v. *Bunny*, 1854, 1 K. & J. 216, *per* Wood, V.C., at 218-20; *Goslings and Sharpe*, v. *Blake* (*cit.*), *per* Lindley, L.J., at 330, and Bowen, L.J., at 331; *Craven's Mortgage, In re, Davies* v. *Craven*, [1907] 2 Ch. 448; *Scottish North American Trust, Limited* v. *Inland Revenue* (cit.), *per* Lord Johnston (*cit.*); *Garston Overseers* v. *Carlisle* (*cit.*), *per* Rowlatt, J., at 386; *Earl Howe* v. *Inland Revenue Commissioners* (*cit.*), *per* Swinfen Eady, M.R., at 344 and 345, Warrington, L.J., at 347, and Scrutton, L.J., at 352; *Stocker* v. *Inland Revenue Commissioners*, [1919] 2 K.B. 702; Income Tax Act 1918, secs. 27 (1) *b* and 36 (1).

At advising—

LORD HUNTER—The question raised in this case is whether or not the respondent, who is a landed proprietor, is liable to pay super tax on a sum of £550, 12s., which consists of interest paid by him to his solicitors in the following circumstances. In 1919 the respondent obtained certain advances from his solicitors in connection with the purchase and sale of some estates. The advances have remained in existence ever since, although the actual amount has varied. Interest was charged upon the advances at the rate charged by Scots banks on overdraft accounts, the rate fluctuating with the bank rate. This was matter of agreement between the parties, although the agreement was not reduced to writing. According to the information submitted to us "the respondent's income is collected by the solicitors, and reductions of the advances are made out of this income from time to time, as well as out of the proceeds of sale of part of the estates. The interest is charged to the respondent annually on the 31st July, and debited to his account. In computing the amount of interest the solicitors make the appropriate deduction for income tax. This interest is treated in the hands of the solicitors as having suffered income tax, and is not again charged to income tax in their hands."

The object of the Income Tax Acts is to recover a tax upon income. The person liable in payment of the tax is the person in enjoyment of the income. This is not altered by the fact that in certain cases, with a view to facilitate collection, the tax payable out of A's income has to be paid by B with a right of relief against A. Super tax is only an additional tax imposed upon an individual whose income exceeds a certain amount. It is perfectly clear that the interest received by the respondent's solicitors is part of the income enjoyed by them. They are liable to pay income tax upon it, and the partners of the firm in making their returns for super tax necessarily include the interest as part of their share in the income of the firm's business. For the purposes of this case it makes no difference that the respondent's agents are a firm and not an individual who in his return would have to include the whole of the interest as part of his income.

The Inland Revenue authorities do not contend that the interest received by the respondent's agents is chargeable with tax both in their hands and in the hands of their client. They allow the agents to found upon the circumstance that the tax, properly payable by them, has been collected from their client. To do otherwise would amount to claiming a right to impose double taxation against the same income, which is contrary to the provisions of the Income Tax Acts as explained in several decisions of the Court. It seems to me, however, that a claim to such a right must be the basis of the appellants' claim, unless the anomalous result is to be approved that income which is only chargeable once in payment of income tax is to be chargeable twice in payment of super tax. I have difficulty in thinking that such a result can have been accomplished even by the complicated provisions of the Income Tax Acts.

Section 5 (1) of the Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), provides that for the purpose of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under this Act, subject to certain provisions. Section 27 (1) enacts that any person making a claim for exemption is to deliver to the assessor of the parish a notice of claim, together with a declaration giving particulars of (*a*) his income from all sources, (*b*) yearly interest or annual payments reserved or charged on his income, and (*c*) sums which he has charged or is entitled to charge against any other person, or which he has deducted or is entitled to deduct out of any payment to which he is or may be liable. By section 209 (1) it is

provided that in arriving at the amount of profits or gains for the purpose of income tax — "(*a*) No other deductions shall be made than such as are expressly enumerated in this Act."

Rule 19 (1) of the general rules applicable to the schedules annexed to the Act is in these terms—"Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, 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, or whether payable half-yearly or at any shorter or more distant periods) is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." The argument presented to us turned mainly, if not entirely, upon the question whether the interest in question fell to be treated as yearly interest within the meaning of this provision. A number of cases were cited to us bearing upon the interpretation to be put upon this or similar expressions in the earlier Income Tax Acts. The respondent founded strongly upon the case of *Bebb* v. *Bunny* (1 K. & J. 216), where it was held that a purchaser in arrear of payment of the purchase money was entitled to deduct the tax upon interest accruing thereon. Vice-Chancellor Page Wood held that the words "yearly interest" in section 40 of the Income Tax Act 1853 mean, not only interest accruing *de anno in annum*, but any interest at a fixed rate per cent. per annum though accruing *de die in diem*. It means at least all interest at a yearly rate and which may have to be paid *de anno in annum*.

In the case of *Goslings & Sharpe* v. *Blake* (23 Q.B.D. 324) it was held that interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment" in 16 and 17 Vict. cap. 34, section 40, and therefore the customer is not entitled to deduct income tax from such interest. In that case Bowen, L.J. (p. 331), said—"We are dealing in this case with short loans only—that is to say, with loans made for a period short of one year, loans which are not intended to be continued, and are not continued for a long period. The question is whether the interest in such a case, where the interest has to be paid at the expiration of the short period, is yearly interest of money within section 40? It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that it is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year."

The reasoning of the English Court of Appeal in *Goslings & Sharpe's* case was approved by Lord Sumner in *Gateshead Corporation* v. *Lumsden* ([1914] 2 K.B. 883), and by Rowlatt, J., in *Garston Overseers* v. *Carlisle*, [1915] 3 K.B. 381. In those cases the question was as to the scope of the words "yearly interest" used in the Income Tax Acts of 1842 and 1853.

In the *Lord Advocate* v. *Corporation of Edinburgh* (1903, 6 F. 1) the First Division of the Court of Session had to consider the somewhat similar words used in section 24 (3) of the Customs and Inland Revenue Act 1888. It was there held that a municipal corporation was bound under the provisions of that section to deduct income tax from the interest paid by it on loans for periods less than a year and to render an account thereof to the Commissioners of Inland Revenue. Lord Stormonth-Darling, who was the Lord Ordinary before whom the case came in the Outer House, in the course of his opinion said (at p. 3)—"It has been decided that interest on money lent for less than a year is chargeable with income tax in the hands of the recipient of such interest. That is the result of the case of *Leeds Benefit Building Society* v. *Mallandaine* ([1897] 2 Q.B. 402) which was a decision on section 2 of the Income Tax Act of 1853." In dealing with *Goslings & Sharpe's* case his Lordship said — "The only question in *Goslings'* case was whether interest calculated at a yearly rate, though for periods of less than a year, could come within the description of 'yearly interest.' The Court held not. But that does not govern a case under a later statute where the language is different and where the purpose is not to confer a privilege on the subject but to provide greater security to the Crown for the recovery of its revenue." In the Inner House Lord M'Laren said—"It has been the policy of the revenue department to collect income tax so far as possible at the source of payment. When the Act of 1888 was before Parliament the opportunity was taken (section 24) to alter the phraseology of the enactments regarding the collection of income tax by way of deduction, and instead of the words being repeated 'yearly interest of money or any annuity or annual payment' the provision is perfectly general that the duty on all interest of money is to be collected by the debtor retaining the duty in order to account to the Crown." The Act of 1918

superseded the provisions in the earlier statutes, but I do not think it was intended to curtail the facilities granted by the Act of 1888 for collection of tax payable in respect of interest on money from the debtor and not from the creditor on whose income the tax ultimately falls.

The origin and history of the legislative provisions relative to taxation of income at its source instead of in the hands of the recipient is traced in an instructive opinion of Lord Macnaghten in *London County Council* v. *Attorney-General*, [1901] A.C. 26. In that case the London County Council, in paying dividends upon certain stock issued by them, deducted the income tax referable thereto. The dividends were payable partly out of rents and interest on authorised advances to other public bodies and as to the balance from rates. In their returns to the Commissioners of Inland Revenue they charged themselves with income tax on the proceeds of rates applied towards the payment of the dividend, but they claimed exemption in respect of the rest of the money so applied as having been paid out of profits or gains already brought into charge. This claim was disallowed by the Commissioners, whose view was affirmed by the Divisional Court and by the Court of Appeal, but their decision was reversed by the House of Lords. In the course of his opinion Lord Macnaghten said (at p. 35)—"Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct." When he came to deal with the provisions of the Act of 1888 his Lordship said—"It is no longer optional for a person who has to make an annual payment to deduct income tax. He is bound to make the deduction and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty. That is a substantial improvement and a reasonable security for payment of duty in many cases where formerly it was liable to be evaded. But to read the enactment as imposing a double duty would be contrary to the whole scope of income tax legislation and whimsical in the highest degree." Lord Davey in discussing the effect of the provisions of section 24 of the Act of 1888 said (at p. 43)—"Their general effect is to make it compulsory on the person paying taxable interest of money (not payable out of income already taxed) to deduct the tax and account for it to the Crown (as in such a case he would be bound to do) instead of leaving the deduction to his option as was done by section 40 of the Act of 1853. Later on he says—"It is not required by the Income Tax Acts in order to raise the right of deduction and retention that the interest on annual payment shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of taxable income, though there may be other subjects of charge." It appears to me that the principle upon which the House of Lords proceeded in solving the question addressed to them in the case of the *London County Council* affords ground for determining the present question without necessarily examining in detail all the English cases which bear upon the meaning of the expression "annual interest" as used in the Income Tax Acts.

The first contention stated for the Commissioners is—"That there was no evidence that the interest was paid out of revenue or that any interest had been paid at all." Little, if any, argument was presented upon this contention. We have got to take the case as presented to us. The assumption upon which it is stated is that interest of the specified amount was in fact paid by the respondent to his agents.

If the payment was wholly made out of capital the respondent ought not to have been assessed upon any part of it. The assessment should have been made upon the recipients of the income. If, however, the interest was paid only partly out of income brought into charge and the deduction properly made, I do not think that you can treat as the respondent's income that part of the interest paid to the respondent's agents either out of capital or out of income already brought into charge, whether the question arises as regards payment of income tax or of super tax.

The second and third contentions run very much into one another. They are—"(2) That the said interest was not a charge on the respondent's income, and (3) that in any event, as all the *indicia* of annual interest were wanting, this interest was not an admissible deduction in computing the respondent's income for the purpose of super tax."

The practical answer to the question put to us appears to me to lie in this. If the Income Tax Authorities choose to collect the tax payable on the income of A at its source in the hands of B, they cannot maintain that the amount on which it was paid does not form a proper deduction from the income of B. To do so would enable them to tax the same income twice contrary to the principle on which the *London County Council* case to which I have referred was decided.

In the course of the argument I was inclined to think that the contention of the Commissioners received support from the circumstance that provision is made in the Act of 1918 for recovery of income tax paid upon interest on short loans to bankers. Section 36 is in these terms—"(1) Where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of interest. (2) A like repayment shall on the like proof be made in the case of interest (not being yearly interest) payable in the United Kingdom on an advance from a person who in the opinion of the Commissioners of Inland Revenue is *bona fide* carrying on business as a member of a

stock exchange in the United Kingdom or from any person who in the opinion of the said Commissioners is *bona fide* carrying on the business of a discount house in the United Kingdom: Provided that no repayment shall be made unless the Commissioners of Inland Revenue are satisfied that the interest has been or will be brought into account in the statement delivered or to be delivered for the purposes of income tax by the person making the advance."

It is manifest that the respondent's agents, although they have in fact granted facilities which as a rule are given by banks, do not come within any of the classes mentioned in the Act. The contention was therefore advanced that the statute did not contemplate relief being given to persons paying interest under such circumstances. The explanation appears to be that in the case of interest on short loans by banks or overdraft accounts the practice of the Inland Revenue is to tax the interest in the hands of the recipient as part of the profits and gains of the banking business, while in the present case their practice is, as stated in the Stated Case, to tax the interest in the hands of the respondent as debtor. In my opinion the answer to the question put to us ought to be in the affirmative.

LORD ORMIDALE—I entirely concur.

LORD ANDERSON—I have not experienced the difficulties in this case which seem to have troubled one of the Commissioners. It seems to me to be quite a plain case, and I have reached the conclusion, without hesitation, that the respondent is entitled to succeed. The question raised in the case depends on the terms of section 27, sub-section (1) of the Income Tax Act of 1918. That sub-section in effect provides that any person claiming exemption, abatement, or relief from super tax shall set forth in a notice of a claim all particulars of any yearly interest reserved or charged on his income whereby it is or may be diminished, and this claim, if it is not successfully objected to, falls to be allowed as a deduction from taxable income. The respondent was charged by his solicitors, for the year 1922, interest in respect of advances made to him, which interest amounted to £550, 12s. He proposed to deduct that sum from his whole taxable income for that year when making a return for super tax for the year ending 5th April 1923. And the question of law which is put to us in this case is whether the interest so paid or charged is admissible as a deduction in computing the respondent's income for the purpose of assessment to super tax.

The question there stated in turn depends upon whether or not that interest so deducted or paid is *yearly* interest in the sense of section 27 (1) of the Income Tax Act of 1918. The payment of course was a payment of interest, but the Crown maintains that it was not yearly interest. Now it seems to me that the main facts which have been found by the Commissioners and set forth in the case are decisive of the question raised in the case in favour of the respondent. Mr Braithwaite found that the advances of money were made under an agreement, and it seems to me that the facts which have been found show that there was an agreement between the respondent and his solicitors, not a written agreement but an agreement ascertainable from facts and circumstances. What was that agreement? What was its nature, and what were its leading incidents? It was in my opinion an agreement for the loan of money, the respondent being the borrower and his solicitors being the lenders. The sum lent and to be lent was indefinite in amount, being advanced by the solicitors to the respondent in such sums and at such times as the respondent's necessities required. There was no agreement as to a fixed maximum amount of advance, and with reference to the interest which the respondent was to pay, it is found that the agreement was that interest was to be charged at the rate charged by the Scottish Banks on overdraft accounts, the rate fluctuating with the bank rate. The mode of repayment of principal and interest is in my judgment material, and what is found as to that is that the respondent's income is collected by the solicitors, and reductions of the advances—and I take it also payment of the interest—are made out of this income from time to time, as well as out of the proceeds of sale of parts of the estate. The interest, it is found, is charged to the respondent annually on the 31st of July and debited to his account. It is also found in the case that this agreement had subsisted and had been operative from the year 1919.

The Crown submitted three contentions, which are to be found in the Case. The main contention, which was based on certain authorities cited by Mr Skelton, was that the interest paid was not yearly interest in the sense of the Act of 1918. Two circumstances, which were to some extent founded on by Mr Skelton, seem to me to be quite immaterial—(first) that the amount of the loan fluctuated in amount—I do not think that it is of any importance—and (second) that the rate of interest fluctuated. To my mind that also is quite irrelevant and immaterial.

The authorities referred to by Crown counsel seem to me to establish these propositions, five in number:—(First) That interest payable in respect of a short loan is not yearly interest—*Gosling*, 23 Q.B.D. 324. This of course is apart from the statutory exceptions created by section 36 of the Income Tax Act of 1918 in favour of bankers, stockbrokers, and so on. (Second) That in order that interest payable may be held to be yearly interest in the sense of the Income Tax Acts, the loan in respect of which interest is paid must have a measure of permanence. (Third) That the loan must be of the nature—and this is pretty well expressing the second proposition in another form that the loan must be of the nature—of an investment—*Garston Overseers*, 1915, 3 K.B. 381. (Fourth) That the loan must not be one repayable on demand—*Gateshead Corporation*, 1914, 2 K.B. 883. (Fifth) That the loan must have a "tract of future time"—per Lord Johnston in *Scottish North American*

Trust, 1910 S.C. 966, at p. 973. These propositions are perhaps one proposition expressed in different forms but they are the result of the authorities. Now the facts found in the present case satisfy me that the first and fourth of the foregoing propositions do not apply to it, and that the three other propositions do apply. The loan in my opinion was not a short loan or repayable on demand. The mode of repayment by sale of heritable property, which involves a lapse of time and negotiations often protracted, negatives these suggestions, and makes it plain that the loan had a measure of permanence and was of the nature of an investment.

I accordingly reach the conclusion that the main contention of the Crown was not well founded. As to the other two contentions advanced by the Crown, I agree entirely with the manner in which they are disposed of in the opinion about to be read by your Lordship in the chair, which I have had the advantage of perusing. I therefore agree that the question of law should be answered in the affirmative.

LORD JUSTICE-CLERK (ALNESS)—The question in this case is whether the respondent, in computing his total income for the purpose of assessment to super tax, is entitled to deduct certain interest for which he was year by year liable.

The circumstances in which the question arises are these. The respondent had, in accordance with a practice which is familiar, a current account with his law agents. That account on the credit side was fed from two sources, viz., (*a*) from the income of the respondent, the quality and amount of which is not disclosed by the case, but which was collected by his agents, and (*b*) from the proceeds of the sale of part of his estates which they effected. On the debit side were ranged, at any rate for a period of four years, certain advances which were made to the respondent by his agents. The amount of these advances fluctuated from year to year, and upon them the respondent paid interest. The amount of interest fluctuated as the bank rate rose and fell, for by that rate the rate of interest payable by the respondent was fixed. The case bears that no security was given by the respondent to his agents for their loans to him, and that there was no written agreement entered into between them either with regard to principal or interest. The most important finding in the case, looking to the question which is now raised, remains to be stated and should be quoted *verbatim et literatim* from the case—"The interest is charged to the respondent annually on the 31st July and debited to his account." It is further found, though I do not recollect that the finding bulked large in the argument from either side of the bar, that in computing the amount of interest the agents made the appropriate deduction for income tax, the interest being treated in their hands as having suffered income tax and not being again charged to income tax in their hands.

These being the facts the question of law is, as I have already indicated, whether the interest referred to is admissible as a deduction in computing the respondent's income for the purpose of assessment to super tax. The Commissioners for the Special Purposes of the Income Tax Acts differed in opinion, and in these circumstances, in accordance with practice, a decision was give in favour of the taxpayer, *i.e.*, the respondent. The Commissioners of Inland Revenue have appealed against that decision.

The statutory provisions upon which the answer to the question of law depends are section 27 (1) (*b*) of the Income Tax Act 1918, section 207 of the same Act, and Fifth Schedule, xvii, third paragraph of the same Act. The combined effect of these provisions may thus be summarised—the respondent is entitled to deduct the interest payable by him on his law agents' advances in computing his income for the purposes of super tax *if it is yearly interest*. The sole question in the case accordingly is, Was the interest for which the respondent was liable yearly interest in the sense of the statute?

If this question fell to be considered and determined apart from authority I should have thought that the findings in the case—and in particular the finding which I have quoted *verbatim* from the case—supplied a plain and conclusive answer to it. If interest is charged to the respondent annually and is debited to his account I am at a loss at first sight to see how in fact or in law it can be other than yearly interest. It is possible, of course, to refine about any question of law, and especially about any question of revenue law, but I must own that I am baffled in my endeavour to see how interest annually debited to the respondent over a period of four years—*i.e.*, interest deducted from the incomings to his current account—can be denied the description of "yearly interest."

The argument on behalf of the appellants was, as I understood it, threefold—1. In the first place they argued that the interest in question lacks the characteristics of permanence and certainty which, say they, are necessary to bring it within the provisions of the statutory exemption. They maintained that the interest contemplated by the statute must partake of the character of an investment, and that it must be certain not fluctuating in amount. As regards the first point I should have thought that *prima facie* an arrangement which had endured for four years reasonably satisfied the criterion of permanence and cannot be assimilated, say, to short loans from a banker. And as regards the second point, it is common knowledge that interest on mortgages fluctuates according to the rate fixed from time to time by the Commissioners, and yet *prima facie* I should have thought that such interest manifestly satisfied the statutory description. Why should fluctuation *per se* affect the principal of the matter? I should have thought that if in point of fact interest is payable yearly and is paid on the sum due, whatever it may be, that interest is none the less yearly though

its amount may fluctuate from time to time.

But it is necessary to examine the authorities founded on by the Commissioners, and to ascertain whether the inferences which the findings in the case suggest to my mind, and the *prima facie* views of the transaction which I have ventured to express, are in any way contracted or controlled by decisions which have already been pronounced. The first case founded on by the Inland Revenue was *Goslings & Sharpe* v. *Blake*, 23 Q.B.D. 324. It was there held that interest on a loan by a banker to a customer for a period of less than a year does not fall within the words "yearly interest" in the income tax statute then in force. The ground of the decision was that the loan was for a period of less than a year, and that interest was payable at the expiry of that period. In other words it was a short loan, and to speak of "yearly interest" on such a loan was held to be a misapplication of ordinary language. But Lord Justice Bowen was careful to add (p. 331)—"When it runs over, then the interest becomes payable during the times it runs over it, and is calculable with reference to the time it is outstanding, and the case may there be different." It appears to me that this case is covered by that reservation, and that nothing there decided in any way modifies the views which I have already expressed.

The next case founded on by the appellants is *Gateshead Corporation* v. *Lumsden*, [1914] 2 K.B. 883. There the Corporation, having made certain street improvements, apportioned the cost among the various frontagers of whom the defendant was one. The Corporation allowed him time to pay the sum apportioned in respect of his premises, and charged him interest at five per cent. The defendant paid irregular sums at irregular intervals, in discharge of his debt, and, on paying off the final amount due by him in respect of principal and interest, claimed to deduct the income tax on the amount due by him in name of interest as being "yearly interest on money." The claim was negatived by the Court. Lord Sumner said (at p. 890)—"There is no agreement for a short loan or a long loan. The debt is due and repayment is not enforced; only in that sense is there a loan. Truly speaking there is simply a forbearance to put in suit the remedy for a debt. The repayment might have been enforced at any moment. The debt might have been paid by the debtor at any moment." The facts seem to me remote from the present case. The debt was due before the transaction was entered into, and it remained unpaid by mere forbearance on the part of the creditor. Again I find a reservation, in the opinion given by Lord Sumner which appears to me to apply to the present case. At p. 888 Lord Sumner says—"It is unnecessary to say whether the section contemplates only a formal agreement by which time is allowed and fixed and presumably regular payments are provided for, or whether it extends to an informal agreement, such as might be inferred from conduct, from which no definite time for payment and no definite instalments would be presumed. That point must be decided when it arises."

The next case cited by the appellants was *Garston Overseers* v. *Carlisle*, 1915, 3 K.B. 381. There the bankers of certain overseers for the poor allowed the latter by arrangement half-yearly interest at an agreed-on rate on the daily balances standing at their credit. The overseers claimed exemption for income tax in respect of the interest, on the ground that it was "yearly interest" withing the meaning of the Income Tax Act 1842. The claim was negatived by the Court. Rowlatt, J., said in giving judgment (p. 387)—"What is the daily balance? It is not even a short loan, it is merely money at call, money payable on demand. . . . This is not yearly interest." Stress was, however, laid by the appellants on a passage in the opinion of that learned judge (at p. 386) where he says—"The broad result of the decisions in these cases is I think that yearly interest means substantially interest irrespective of the precise time in which it is collected, interest on sums which are outstanding by way of investment as opposed to short loans or as opposed to moneys presently payable and held over or anything of that kind." I have no doubt that the learned Judge had in his mind the cases of *Goslings* and of *Gateshead* to which I have referred, and that he uses the word "investment" to signify that the arrangement, if it is to receive the statutory benefit, must have some measure of permanence. For the reasons already given I think that the arrangement in this case may fairly be regarded as of a permanent character. There is certainly nothing in the case to suggest that it is temporary. It does not appear to me that the decision affords any assistance to the appellants.

Reference was also made by the appellants to the case of the *Scottish North American Trust, Limited* v. *Inland Revenue* (1910 S.C. 966, 1912 S.C. (H.L.) 26) and in particular to an observation by Lord Johnston in the Court of Session (p. 973) on the meaning of the words "annual interest." He there says—"The natural inference is that a distinction is drawn with intention between interest which can be properly described as annual though it may be paid at shorter terms and interest which cannot be so described, but is casual or anything from day to day upwards short of annual. I think that the distinction between the two classes of cases may be somewhat aptly described by the use of a term of Scots law. Where the interest is payable in respect of an obligation having a 'tract of future time,' it may in the sense of the statute be understood as annual, and where not, not." The respondent's counsel did not shrink from accepting the challenge conveyed by Lord Johnston's test and from avowing that the arrangement in this case satisfied it. In that contention I think he was well founded. The House of Lords, on appeal, affirmed the decision of the Court of Session, and Lord Atkinson assimilated the case to that of *Goslings & Sharpe* v. *Blake*. It does not appear to me that the case of *Leeds Per-*

manent Benefit Society v. *Mallandaine* (3 Tax Cases 557, 77 L.T. 122), which was also cited by the appellants, throws any light on the present issue.

I have examined the cases quoted by the appellants with the exception of the last at some length and with some care because they were earnestly pressed on our notice by a responsible public department, but in the result I confess that they in no way modify the impression which I formed at an early stage in the argument—that the findings in fact in this case are of more importance than are the decided cases. Indeed, I still regard these findings as conclusive of the question with which we are concerned.

It is proper before I leave the appellants' argument to refer to another point which they took, and which related to section 36 of the Act of 1918. It was argued that in the present case the position of the law agents was the same as the position of a banker who accommodated his customer by advances, and it was contended that it required the provisions of section 36 to enable the banker's customer to obtain repayment of tax on the interest paid. I think the contention is based on a misconception of the purpose and effect of section 36. The answer to it is to be found in the note to section 36 on p. 62 of Dowell's Income Tax Laws, where it is pointed out that section 36 placed the payer of interest *on a short loan* in the same position as the payer of yearly interest. In other words, it is a false assumption that before the date when section 36 became law the customer of a bank was not entitled to deduction of income tax upon yearly interest paid by him on advances made to him by his banker.

I now turn to the respondent's contentions.

Reference was made by him to the case of *Bebb* v. *Bunny*, 1 K. & J. 216. There a purchaser liable to pay interest on certain purchase money was held entitled to deduct income tax from such interest. Vice-Chancellor Wood said (at p. 219) in construing the words "yearly interest"—"In the construction of this Act" (16 and 17 Vict. cap. 34), sec. 40—"I must hold that any interest which may be or become payable *de anno in annum*, though accruing *de die in diem*, is within the 40th section." I think that the cases of *Earl Howe* v. *Inland Revenue Commissioners* ([1919] 2 K.B. 344) and *Stocker* v. *Commissioners of Inland Revenue* ([1919] 2 K.B. 702), which were also cited by the respondent, are somewhat remote, and that they do not substantially advance his argument. The case of *Davies* v. *Craven* ([1907] 2 Ch. 448), also cited by the respondent, is however worthy of more careful consideration. It was there held that, as certain interest was calculable by the year, it was "yearly interest" within section 40 of the Income Tax Act 1853. *Bebb* v. *Bunny* was followed. *Goslings & Sharpe* v. *Blake* was distinguished. Warrington, J. (p. 457), says—"*Goslings & Sharpe* v. *Blake* is confined to short loans for periods of less than a year, and *Bebb* v. *Bunny* applies where interest is reserved for a period of more or less than a year, but is calculable by periods of a year. That is the case here." And his Lordship also says (p. 456)—"I do not think it makes any difference whether there is an express covenant or an implied liability." In the present case there is, to say the least of it, an implied liability.

The question which we have to determine may be stated broadly thus—Is this transaction of the nature of a short loan, or is it of the nature of an investment? It certainly does not fall within the former category. I think it falls within the latter. The annual calculation of interest stamps the transaction with a certain measure of permanence, and the duration of the arrangement—viz., four years—assimilates it rather to a mortgage than to a short term loan.

But the appellants propounded two other arguments, which I thought were faintly urged, but which it is necessary briefly to notice.

2. They said that, assuming the interest to be yearly interest, it is not shown to have been "yearly interest" charged on the respondent's income, as required by section 27 (*b*) of the Act of 1918. The answer to that contention is to be found, I think, in the opinion of Warrington, J., in *Earl Howe's* case (*supra*, p. 348), to which I refer. If one finds a charge which diminishes income, as I find here, then the statutory words are satisfied, and the exemption operates.

3. The third and last point taken by the Inland Revenue was that there is no statement as to whether the interest said to have been paid was actually paid out of the respondent's income. I consider that the third finding in the case negatives that view.

I therefore concur in the conclusion of Lord Hunter that the interest with which the case is concerned is "yearly interest" in the sense of the statute, and I accordingly agree that the question put falls to be answered in the affirmative.

The Court answered the question of law in the affirmative.

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Counsel for the Respondent—Henderson, K.C.—Maclean. Agents—J. & F. Anderson, W.S.