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

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

The Court pronounced this interlocutor—

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

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

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

Tuesday, March 4.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GRAHAM *v.* PURVES.

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

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

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

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

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

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

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

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

In the pleadings as amended it was

admitted that the Rent and Mortgage Interest (Restrictions) Acts applied to the house.

It further appeared from the pleadings that the house in question was purchased by the pursuer on or about 27th October 1920, with entry at Martinmas 1920, that it was then occupied by the defender, and that a notice requiring her to remove at Whitsunday 1923 was served on her on 12th February 1923.

The pursuer pleaded, *inter alia*—"1. The defender's right of occupancy of said dwelling-house having expired, and due warning to remove having been given, the pursuer is entitled to decree of ejection as craved. 2. The pursuer having become landlord of the said dwelling-house before the 30th day of June 1922, and the said dwelling-house being reasonably required by her for occupation as a residence for herself, and the defender having refused to remove therefrom, she is entitled to decree of ejection as craved, with expenses. 3. The pursuer being landlord of the said dwelling-house and having no contract with the defender for the tenancy thereof, she is entitled to decree as craved." The first plea-in-law was added at amendment.

The defender pleaded—"1. The action is (*a*) irrelevant and (*b*) incompetent as laid. 2. In respect that defender was on 28th May 1923 still protected by the Rents Act then current, that the notice of removal founded on as given for that date is insufficient, and defender's right of occupancy accordingly still continues in force and unaffected by said notice, the warrants craved should be refused with expenses. 3. The notice of removal referred to being no longer effective in respect (*a*) that no action has followed on it within three months after 28th May 1923, and (*b*) that pursuer has returned defender as tenant of the subjects for the year 1923-24, the warrants of ejection and others craved should be refused with expenses to defender. . . . 6. Pursuer having already sufficient accommodation does not, in the circumstances condescended on, 'reasonably require' in the meantime personal occupation of the house in question." The second plea-in-law was added at amendment.

On 1st December 1923 the Sheriff-Substitute (ORR) repelled branch (*b*) of the first plea-in-law and sustained branch (*b*) of the third plea-in-law for the defender and dismissed the action.

The pursuer appealed to the Sheriff (CROLE), who on 18th January 1924 recalled his Substitute's interlocutor, *inter alia* repelled the first, second, and third of the defender's pleas, and *quoad ultra* allowed the pursuer a proof before answer of her averments that the house in question was reasonably required for occupation as a residence for herself along with her husband and family, and to the defender a conjunct probation.

The defender appealed, and argued—The house in question came within the scope of the Rent Restriction Act. Consequently an application for removal made in respect of it was an application under the Act and must follow the procedure the Act indicated. The Act of Sederunt of December 2, 1920, provided that an application to the Sheriff under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 should be a summary cause in terms of the Sheriff Courts (Scotland) Acts 1907 and 1913. The present action being merely an ordinary application for removal at common law was accordingly incompetent, inasmuch as the wrong procedure had been adopted. The appeal should therefore be allowed. Counsel referred to two cases decided in the Sheriff Court—*Whitelaw* v. *Gallagher*, 1923 S.L.T. (Sheriff Court Reports) 123; and *M'Arthur* v. *Coffield*, 1923 S.L.T. (Sheriff Court Reports) 130.

Argued for the pursuer and respondent—The action was competent as laid. The Rent Restriction Act did not abolish the right to bring a common law action of removing, though it might provide a good answer to such an action when brought. As regards the amendment allowed by the Sheriff, it was within the power of the Court to allow a pursuer to amend so as to make competent an action that had originally been incompetent—*Paxton* v. *Brown*, 1908 S.C. 406, *per* the Lord President (Dunedin) at p. 414, 45 S.L.R. 323. Counsel referred also to *Rackstraw* v. *Douglas*, 1919 S.C. 354, 56 S.L.R. 253; *Glasgow Corporation* v. *Mickel*, 1922 S.C. 228, 59 S.L.R. 153; and *Adamson* v. *Gillibrand*, 1923 S.C. 718, 60 S.L.R. 457.

LORD JUSTICE-CLERK (ALNESS)—This is an action of removing which was raised in the Sheriff Court. The initial writ in the proceedings is in ordinary form. The Sheriff has allowed a limited proof, and against his interlocutor an appeal has been taken to this Division. [*Having disposed of the question as to the competency of the appeal his Lordship proceeded*]—On the merits two questions have been argued before us. The second of these, which I deal with first, only in order to dismiss it, is the argument founded upon waiver. That plea was, however, abandoned by Mr MacRobert in addressing us, and in abandoning it I have no doubt that he exercised a wise discretion, as it appeared to me from the outset that the plea was a hopeless one.

Accordingly the only question which remains for consideration is whether or not these proceedings as brought or as amended are competent. It was maintained that they were incompetent because they were not brought in summary manner, as was directed by the Act of Sederunt which was cited to us. The argument which Mr MacRobert presented was twofold. He maintained, in the first place, that the action was incompetent because actions of removing were abolished by the Act of 1923, and he referred in particular to section 4 of the latter Act, which provides that "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless" certain conditions are fulfilled. And then he cited certain of these conditions, all of

which refer to an application made under the section in question, that is, section 4. But section 4 does not in terms provide that an action at common law shall not be raised. I think it is perfectly plain that that was not intended, and at any rate that it is not provided by the section. But while an action at common law remains competent, it may also well be that the Act of 1923 has provided a complete answer to that action when brought. The action may turn out in the circumstances to be a hopeless enterprise. To suggest, however, as Mr MacRobert did, that by reason of this Act of 1923 all actions of ejection at common law as hitherto known to the law of Scotland were abolished, finds, as I think, no justification whatever in the terms of the Act of Parliament itself, nor, I think, is there any implication to that effect.

But it was maintained by Mr MacRobert, in the second place, that this application is in terms presented under the Rent Restriction Act. To that it is replied that the action is at common law and not under the Act. So far as the original action—before it was amended—is concerned, I must confess that it appears to me that the draftsman must have thought that he was presenting an application in terms of the Rent Restriction Act. I say so because of the averment to which reference has frequently been made in the course of the discussion, and because of the first plea-in-law. The pursuer, however, was given an opportunity of amending his action, and he did so, and the case of *Paxton* v. *Brown* (1908 S.C. 406) is an authority for the proposition that an action which was originally incompetent can now by amendment be made competent. The action as it now stands comes before us as an action from which the averment to which I have referred has disappeared. All that now can be said about it as being an application under the Act is that one averment in the course of the somewhat lengthy pleadings tarries in the record, and refers to the fact that the occupancy of this house as a dwelling-house for the pursuer is required. There is no doubt that that averment is an echo of the statutory language; but my view, which I suggest to your Lordships for consideration and acceptance, is that in substance and in fact this action is now a common law proceeding and nothing else. It is quite true that in defence to that common law action there are pleas founded upon the Rent Restriction Act which may or may not be successful, but the common law action remains intact unaffected by the statute.

I have the less hesitation in reaching that conclusion when I remember the anomaly which would result from any other conclusion. I can understand, as I said in the course of the discussion, that applications which are incidental to the Act should be tried in a summary manner. But the very intention —or one of the leading intentions—of the Act was to protect tenants and to stereotype their occupation of houses at a time when there was a shortage of dwelling-houses. And it would be indeed strange if by reason of an Act passed to protect tenants the protection afforded should take the form of facilitating the ejection of these very tenants by ordaining that the process should be more summary than it would otherwise have been.

That anomaly may be avoided if the case is decided in the manner I suggest. Therefore on the broad view (first) that the Act does not abolish actions of ejection at common law, and (second) that in substance and in fact this action now partakes of that character, I suggest to your Lordships that the result reached by the Sheriff is a correct result. I find myself in agreement on this point not only with the conclusion he has reached, but with the grounds which he and the Sheriff-Substitute have stated in support of that conclusion.

I move that we affirm the judgment appealed against.

LORD ORMIDALE—[*After considering the competency of the appeal*]—On the other more general question as to whether or not the Rent Restriction Act has, either expressly or by implication, repealed the right to raise an action of summary ejection at common law I entirely agree with your Lordship. There is certainly no provision in the Rent Restriction Act in express terms to that effect, and after giving the best consideration to the many sections to which we were referred by counsel I do not think it a necessary inference from these various sections that so sweeping a change was meant to be effected.

LORD HUNTER—[*After dealing with the question of the competency of the appeal*]—Assuming, however, the competency of the appeal—and I think we must assume the appeal to be competent—there remains the question as to whether the Sheriff was right in following the course which he did. The appellants have abandoned the attack which was made on the Sheriff's exercise of discretion in allowing proof. They say if there was any case properly before him he was right enough to allow proof. But as I understand their position they say both the Sheriff-Substitute and the Sheriff were wrong because they entertained the present application at all. They say it was incompetently brought. And upon what ground? The application is presented as an application in ordinary form for removal of the defender from premises of which the pursuer is the owner. Under the Rent Restriction Act the right of a proprietor to have a tenant removed is limited. Certain defences may be put forward which if they are well founded would disentitle the proprietor to get removal. On the other hand, even although *prima facie* a defence is put forward, under certain circumstances a reply is open to the owner—in particular the reply may be that he requires the premises for his own reasonable use and occupation. And that is one of the points raised in the present case.

Well now, on the face of the writ, the application is an application in common form. If, however, an application is, strictly speaking, brought under the Rent Restric-

tion Act by Act of Sederunt passed on 2nd December 1920, the application should be in the nature of a summary application, or rather it should be in the form of a summary cause. As your Lordships are well aware two forms of action may be brought in the Sheriff Court—one is the ordinary form of action with certain prescribed procedure; the other is what is known as a summary cause. The defender's main objection is that this action was shown to be an ordinary action because of the form of service made upon her. The form of service in the ordinary action cites the defender to appear within, I think, three days to state what objection he has to the action. The form of citation in a summary cause just ordains him to appear in order that the Sheriff may deal summarily with the action. On the other hand, even in the case of a summary cause, once the defender has appeared the Sheriff is master of the procedure and he may cause the same procedure to be adopted in a summary cause as in an ordinary cause.

What occurred was this—objection was taken before the Sheriff-Substitute that this application was brought in incompetent form. The excuse for putting forward that contention was undoubtedly available to the defender, because the pursuer had based his plea-in-law upon the Rent Restriction Act and had stated, as part of his statement attached to his writ, that the application was under the Rent Restriction Act. If the application had been an incidental application under the Rent Restriction Act, then of course it would have been an application that ought to have been brought as though it were of the nature of a summary cause, and the defender would have been prejudiced—if prejudiced at all—to the extent that there had been a wrong form of service. I do not think, however, that the Sheriff-Substitute before whom it came was absolutely powerless in the matter, and that the rules of the Sheriff Court are so pedantic that when he was so perfectly clear that the defender was not to be in the slightest way prejudiced by a conversion of the application from the form of an ordinary application into a summary application, he was not entitled so to convert, and that at his own hand, so as to save the parties expense. There appears to me to be a warrant for that view as to the Sheriff's power under the Sheriff Court Act in the decision that was pronounced in the First Division in the case of *The United Creameries Company* v. *Boyd & Company*, 1912 S.C. 617. There an application had been wrongly brought in the form of a summary application. The Inner House held that there was no reason why it should not be treated as an ordinary application. In dealing with the matter Lord Johnston said—"As soon as it became apparent that something more than the performance of a ministerial duty was involved, it was obvious that this case could not either conveniently or properly be tried in a summary form. That, however, did not prevent the Sheriff as soon as this was made apparent—and it was so at a very early stage of the case—from transferring it at once to his ordinary Court."

By parity of reasoning it appears to me that if an action has been brought as an ordinary action in the Sheriff Court, and it appears at any stage that it ought to have been brought as a summary cause, there is absolute power in the Sheriff-Substitute to convert it into a summary cause. And I think, although that matter does not appear to have been more definitely decided in the Court of Session than by way of indication of opinion in the case I have referred to, it has been decided in more than one case in the Sheriff Court. The late Sheriff M'Lennan in one case that is referred to in the Sheriff Court Review held that he was entitled so to convert an action. In my opinion that view is more consonant with what I think is sound procedure in the interest of parties generally than adopting the highly technical course of throwing an action out entirely as appears to have been done in the Sheriff Court in one or two cases that were referred to by the appellant. The passage from Sheriff M'Lennan's opinion is in the case of *Thirple* v. *Copin*, 1912, 29 Sheriff Court Review 13. At p. 21 he refers to the irregularity and says—"It appears to me that it would be most unfortunate if such a venial irregularity entailed dismissal of the action. I am satisfied that no such consequence is entailed. In the *United Creameries* case the Court ordered a cause which had been incompetently treated by the Sheriff as a summary application not to be dismissed but to be transferred to the ordinary roll, and in an appropriate case I think the converse might happen—a cause erroneously treated as an ordinary action might be ordered to be treated as a summary application (subject probably to the allowance of the expense occasioned by making up an unnecessary record). I am fortified in this opinion by judicial observations in the case of *Bone* v. *The School Board of Sorn*, 1886, 13 R. 768, at 772."

If, therefore, the defender had had any interest whatever to have this action treated as a summary cause, it might quite well have been so treated in spite of the circumstances that it was originally brought as an ordinary cause in the Sheriff Court.

But then there appears to me a further ground—upon which I think your Lordship has proceeded—than the one I have just indicated, viz., that this application made to the Sheriff, although in form it bore to proceed under the Rent Restriction Act, was not in reality anything other than an application for removal at common law. And the Sheriff having allowed amendment by way of cutting out the reference to the application being an application under the Rent Restriction Act, the action remained, after that procedure had been followed, alive as a good application at common law unless such an application was rendered incompetent under the Rent Restriction Act. On that matter I also agree with what your Lordship said—that there is not in any of the provisions of the Rent Restriction Act any clause prohibiting such an

action as the present being brought. The object of the Rent Restriction Act was to give relief to the tenant—that is to say, if the landlord brought an action which otherwise he was quite entitled to do, the tenant might successfully defend against his action by pleading the provisions of the Rent Restriction Act. That, I think, is what has been done in this case, and the answer was put in by the landlord—"That is perfectly true, but I have a reply to your defence, and that is that I am wanting possession of my own property under the statute." May I say that in such a case as that it would be eminently desirable that there should not merely be a summary application but also a statement by the defender of the grounds upon which she maintained that the landlord was not entitled to get the house which belonged to her, and a reply by the landlord to that statement. That is what happened in the present case. Proof has been allowed. But it is a matter greatly to be deplored, in consequence of the protracted discussions that have taken place over the preliminary point involved in this case, that the inquiry which ought to have concluded long ago is not yet started.

LORD ANDERSON did not hear the case.

The Court adhered.

Counsel for the Defender and Appellant—MacRobert, K.C.—Macgregor. Agents—Ross Smith & Company, S.S.C.

Counsel for the Pursuer and Respondent—Mackay, K.C.—Garson. Agents—Purves, Neilson, & Oliver, S.S.C.

Wednesday, March 5.

SECOND DIVISION.

SMITH'S TRUSTEES *v.* SMITH.

Succession — Testament — Construction — Annuity — "Free of All Income Tax, Government Duties (if any), and All other Deductions" — Whether Super Tax Included — Finance (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *sec.* 66 — *Income Tax Act* 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 4—*Finance Act* 1920 (10 *and* 11 *Geo. V, cap.* 18), *sec.* 15 (1).

By trust-disposition and settlement, executed on 11th April 1914, a testator directed his trustees to pay to his wife during all the days of her life an annuity of £2000, free of all income tax, Government duties (if any), and all other deductions. Her total income exceeded £2000 and was accordingly liable to super tax. *Held* that the trustees were bound to relieve the widow of her liability to super tax in respect of the annuity.

Mrs Florence May Wimble or Smith, widow of Joseph James Smith, and others, the testamentary trustees of the said Joseph James Smith, *first parties*, and the said Mrs Florence May Wimble or Smith, *second party*, presented a Special Case for the opinion and judgment of the Court.

The Case stated—"1. The said Joseph James Smith died on 14th March 1914 leaving a trust-disposition and settlement whereby he conveyed his whole estate to the trustees therein mentioned in trust for the purpose therein set forth. . . . The testator was survived by his wife and a son, . . . who died on 13th January 1915. . . . The second party thus survived her son. 2. . . . By the fifth purpose of the said trust-disposition and settlement the testator directed his trustees to make payment to his said wife during all the days of her life of an annuity of £2000, such annuity to be payable free of all income tax, Government duties (if any), and all other deductions. . . . By the seventh purpose of the said trust-disposition and settlement the testator directed his trustees to pay to his said son, should he survive the testator, during all the days of his life, the free annual income of the residue and remainder of the trust estate after satisfying the said annuity; and by the eighth purpose thereof the testator directed that in the event of his said son predeceasing his (the testator's) said wife (the event which happened) and of the free income of said residue exceeding the said annuity of £2000, his trustees should in lieu of the said annuity pay to his (the testator's) said wife during all the days of her life the free annual income of said residue. . . . 4. . . . Since the commencement of the trust administration the free annual income of the residue of the estate has varied from year to year. In the first year of the trust, ending 14th March 1915, the second party received payment of the fixed annuity of £2000 per annum; thereafter (the testator's son having died as already stated in January 1915) she received payment for each of the three years up to the year ending 14th March 1918 of the available free income which was in excess of the fixed annuity. For the years from 14th March 1918 to 14th March 1921 the second party received payment of the said fixed annuity, and for the following year the free income was less than the amount of the annuity free of income tax and super tax. 5. In addition to the annuity or free income which the second party has thus received from the first parties in terms of the said trust-disposition and settlement, she has a private income which is at the present time approximately £700 per annum, and thus the second party is in respect of her total income liable to the Inland Revenue for super tax in respect that her income exceeds £2000. Super tax is collected from the second party direct, and has not formed a deduction or payment in any of the first parties' trust accounts. The second party, however, claims that the first parties should pay either in whole or in part the super tax for which she is liable when she is in receipt of the said annuity, or when the free annual income payable to her, although in excess of the said annuity, falls short of the said annuity and super tax effeiring thereto. In the circumstances of the present case and in virtue of the terms of the said trust-disposition and settlement, the first parties do not feel themselves free to do so without the judi-