Saturday, July 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary in Exchequer Causes.

LORD ADVOCATE *v.* HENDERSON'S TRUSTEES.

Revenue—Estate-Duty — Property Passing on Death — Cesser of Annuity Payable out of Heritage subject to Bonds—Value of Benefit Accruing—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*b*) *and* 7 (7).

On the death of an annuitant in receipt of an annuity of £750 charged upon the heritable properties of a testamentary trust, a benefit accrued and was chargeable with estate-duty under the Finance Act 1894. The heritable properties were valued at £120,630, being fourteen years' purchase of the rental after deducting feu-duties and public burdens, but they were subject to bonds amounting to £80,173. The Revenue authorities claimed that, like the properties, the benefit accruing on the cesser of the annuity should be valued at fourteen years' purchase of the annuity, viz., at £10,500; the trustees that it should be valued at a sum which would bear the same proportion to the capital of the trust as the annuity bore to the income of the trust, viz., at £4717.

Held that the value of the benefit arising from the cesser of the annuity was under section 7 (7) (*b*) of the Finance Act 1894, the principal value of an addition to the properties equal to the said annuity, and was in the circumstances properly calculated at fourteen years' purchase of the said annuity.

The Finance Act 1894 (57 and 58 Vict. c. 30) enacts—sec. 2 (1)—"Property passing on the death of the deceased shall be deemed to include . . . (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest." . . . Section 7 (7)—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (*b*) if the interest extended to less than the whole income of the property be the principal value of an addition to the property equal to the income to which the interest extended."

This was an action at the instance of the Lord Advocate on behalf of the Inland Revenue Commissioners, pursuer, against William Boyd Anderson, writer, Glasgow, and others, the trustees acting under the trust-disposition and settlement of the late James Henderson, timber merchant, Partick, dated 17th November 1881, and registered 17th January 1882, defenders, *inter alia*, to ordain them to lodge a corrective account of the property which passed, or was deemed to have passed on the death of Mrs Margaret Anderson or Henderson, the testator's widow, for the purpose of ascertaining the estate-duty chargeable in respect of the value of the benefit accruing from the cessor of an annuity of £750 payable to her out of heritable property of the trust estate. Mr Henderson died on 3rd January 1882, and his widow, the said Mrs Margaret Anderson or Henderson, on 8th March 1903.

By his trust-disposition and settlement Mr Henderson directed his trustees to pay to his widow an annuity of £800, and to allow her during her viduity the liferent use of his furnished residence of Broomhall, Partick, or in lieu of that an annual payment of £150, which annual payment Mrs Henderson elected to receive. By the seventh purpose it was directed that the net annual income from the heritable properties of the trust, and also the net income of the other means or estate, should be applied, in the first place, in payment of the said annuity.

In December 1883 the trustees lodged a residue account for payment of legacy-duty, the equivalent of the succession-duty chargeable on the testator's death in respect of his heritable property, and in that account it was arranged to treat the said annuity as payable to the extent of one-fourth, *i.e.*, £200, out of the personalty, and to the extent of three-fourths, *i.e.*, £600, out of the heritage. There was therefore deducted in the said account from the value of the heritage the sum of £15,000 as being required to meet the said annuity, and the sum of £3750 as being required to meet the additional payment of £150 in lieu of the use of Broomhall.

In October 1903 an estate-duty account had been lodged on behalf of the defenders for assessment of the duty due in respect of the cesser of the annuity of £750, treated as payable out of heritage. The value of the benefit accruing or arising from the cesser was set forth therein as £4717, 4s. 6d., and upon that sum estate-duty assessed at 3½ per cent., and amounting to £165, 2s. 1d., was paid. According to the account the gross principal value of the heritable properties was estimated to be £120,630, 1s. 1d., and deducting bonds, said to amount to £80,173, 11s. 4d., a net principal value was brought out of £40,456, 9s. 9d. By schedules lodged with the account the gross annual value of the heritable subjects was shown to be £11,686, and after deducting a sum of £3070, 11s. 2½d. in name of feu-duties, ground-annuals, police rates, and other public burdens, and a further sum of £2181, 15s. as interest on bonds amounting to £62,950, there was shown a net rental of £6433, 13s. 9½d. It was understood that the difference between these bonds for £62,950 and those for £80,173, 11s. 4d., viz., £17,223, 11s. 4d., represented liquidation of bonds out of the testator's moveable estate.

The pursuer now stated—"(Cond. 8) On an examination of the said estate-duty account it appears that the value upon which duty was paid was materially under-

estimated. The sum of £4717, 4s. 6d. did not represent even approximately the true principal value corresponding to the annuity of £750. Such an annuity meant a life interest in so much capital as was required to yield that amount of income. The sum of £18,750, which the defenders themselves deducted in the residue account and set against the annuity, so far as that was regarded as chargeable against heritage, would at 4 per cent. have yielded an income of £750. The defenders also, in valuing the whole heritable properties belonging to the trust, proceeded on the basis of a fourteen years' purchase of the net rental, after meeting feu-duties and such necessary outgoings, and on the same ratio an annual sum of £750 would mean a capital value of £10,500. It is accordingly claimed that the estate-duty payable in respect of the cesser of the widow's annuity should be assessed on the footing that the principal value proportionate to the annuity amounts to at least £10,500." . . .

In their answer the defenders explained—"That the sum of £4717, 4s. 6d. represented the capital value of the annuity of £750 in terms of the Finance Act 1894, sec. 7 (7) (*b*), that capital sum bearing the same proportion to the total capital of the trust that the annuity of £750 bore to the income of the trust. The deduction of £18,750 which the defenders made in the residue account and set against the annuity, was made before the passing of the Finance Act 1894, and in terms of the statutes then in force. The deduction then made had the effect of merely deferring payment of duty in respect of that sum, and not of freeing the fund from duty altogether. Legacy-duty at 1 per cent. is still claimed upon this sum under deduction of whatever sum is found to be liable in estate-duty." . . .

The pursuer pleaded, *inter alia*—"(2) The value of the heritable estate being taken at so many years' purchase, the principal value of an addition to it should be determined on the same basis."

The defenders pleaded, *inter alia*—"(4) In respect that the benefit arising on the cesser of the deceased's annuity ought to be valued on the basis of taking into account, *inter alia*, the burdens affecting the heritable estate, the defenders should be assoilzied."

On 18th May 1905 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor—"Finds that in estimating, for the purposes of estate-duty, the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750, payable out of the heritable property forming part of the trust estate, the principal value of an addition to the said property equal to the said annuity must, under section 7 (7) (*b*) of the Finance Act 1894, bear the same proportion to the market value of the said property at Mrs Henderson's death, after deducting the burdens thereon allowed by section 7 (1) of the said Act, as the amount of the said annuity bore to the whole free income of the said property at the same date."

Opinion.—"The only question which was here argued relates to the mode of valuing a liferent annuity of £750 which terminated on the death of Mrs Henderson on 6th March 1903. The annuity was created by the will of her husband, who died on 3rd January 1882, leaving both heritable and moveable estate. The value of the annuity, as provided by the will, was £800, *plus* a right to the occupation of his furnished residence, or (in lieu of that) an annual payment of £150; and the testator directed that the net annual income from both the heritable and moveable parts of his estate should be applied in the first place in payment of the annuity. The reason why the amount of the annuity for the purposes of estate-duty comes to be reckoned at only £750 is this—In settling for the duties payable at the death of the testator, both parties treated the annuity of £800 as payable out of moveables and heritage respectively in the proportion of one to three, *i.e.*, £200 as payable out of moveables and £600 out of heritage. Accordingly, when £150 a-year, as representing the value of the liferent of the house, is added to this estimated sum of £600 a-year, you have an annuity of £750 allocated to heritage, and nobody proposes to disturb that division. It is only in so far as payable out of heritage that the annuity has to be reckoned for purposes of estate-duty, because the moveable part of the estate is admittedly exempt from estate-duty, as having already borne inventory-duty.

"Now, the value of the benefit accruing or arising by the cesser of an interest in property is regulated by the Finance Act 1894, sections 2 (1) (*b*) and 7 (7), and the question here raised turns chiefly on the construction of the latter section, which relates to the manner of estimating the benefit. The section first deals with the case where the interest extends to the whole income of the property, and provides that in that case the value of the benefit arising from the cesser of the interest shall be the principal value of the property. A previous sub-section, viz., 7 (5), provides that 'the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.' When, therefore, an annuity consists of the whole income arising from a particular heritable subject the matter is plain enough, for the property is to be taken at its market value at the date when the annuity terminates by the death of the annuitant. Where, however, the interest ceasing at the death of the annuitant extends to less than the whole income of the property, the matter is not so plain, and the rule of valuation laid down by section 7 (7) (*b*) cannot be said to be a model of clearness. Indeed, if the words were taken literally they would work out rather a nonsensical result, for the declaration that the value of the benefit is to be 'the principal value of an addition to the property equal to the income to which the interest extended' might be read as meaning in the present case an addition

of only £750. This, however, is so manifestly not the real meaning of the subsection that the defenders do not contend for it. The parties are agreed that the hypothetical addition to be made to the property is to be something which will be capable of yielding the income to which the interest extended, and they differ only as to the mode in which the addition is to be calculated.

"I cannot say that the actual figures suggested by either party afford an altogether satisfactory basis for solving the question. The Crown suggests an addition of £10,500, which is just the annuity of £750 capitalised at fourteen years' purchase. The defenders, on the other hand, suggest an addition of £4717, 4s. 6d., as bearing the same proportion to the total capital of the trust that the annuity of £750 bears to the income of the trust. This latter suggestion is at first sight a little startling, for it implies that the heritable property on which the annuity is charged yields an annual return of nearly 16 per cent. I think it would have been more satisfactory if there had been a detailed statement of the total value of the heritable subjects on which the annuity was charged after deducting the other burdens thereon allowed by section 7 (1), and of the total income yielded thereby, all as at 6th March 1903. But, in the absence of such actual figures, it is perhaps enough for the decision of the case that I should state the principles on which, in my opinion, the hypothetical addition to the property prescribed by section 7 (7) (*b*) ought to be made.

"In the notes to this rather enigmatical sub-section by the editors of the 4th edition of the late Mr Hanson's book, I find a suggestion in which I concur. They say—'In the case here provided for, the addition must, it is conceived, be of such a sum as will at the average rate of income which the actual property is producing return an income equivalent to the amount of income received in respect of the interest which has ceased.' Then they go on to figure a case where a property worth £20,000 is producing an actual income of £800, and the benefit which is being valued is the cesser of an annuity of £400, in which case, they say, the principal value upon which duty has to be paid would be just one-half of the value of the property, or £10,000. Now, all this recognises, rightly I think, that regard must be had to the market value of the actual property on which the annuity is charged as at the date of the annuitant's death, and to the actual free income yielded by it as at the same date. Thus it is impossible to settle the question either by taking an arbitrary number of years' purchase of the annuity, or by taking a capital sum which would yield the annuity at any percentage which is merely customary. It is to my mind inconceivable that, where the annuity covers the whole income of a property you should be relegated under section 7 (7) (*a*) to market value, of course after deducting burdens, and that where the annuity covers something less than the whole income you should be free under section 7 (7) (*b*), to disregard the actual facts altogether. It is of no consequence, in my view, whether the income yielded by the property charged with the annuity be large or small, usual or unusual. What you want to get at is the value of the benefit arising to the actual property by its being relieved of the actual burden. If the income yielded by the property be unusually large, the capital value of its relief from the fixed burden will be proportionally small; and in any case the value must be ascertained as at the death of the annuitant, and can take no note of events affecting value either before or after that event."

The pursuer reclaimed, and argued—The Lord Ordinary's method of arriving at the principal value of the addition was wrong. The bonds ought not to have been deducted, nor was there any reason for stating a sum in proportion. The bonds had nothing to do with the capitalised value of the annuity. In any event, the formula stated by the Lord Ordinary in his proportion sum was incorrect, viz., as the net rental (£6433) was to the annuity, so was the net principal value (£40,456) to the value of the benefit. The sum of £6433 was a wrong ratio, as it did not correctly represent the rental of the property, but the rental after deducting interest on the bonds. The correct way of stating the formula would have been, as the rental of the heritage (£8615) was to the annuity, so was the principal value of the heritage to the capital value of the annuity. The real question was, what capital sum would in the circumstances here represent an annuity of £750. That was the addition required to be made under the Finance Act—*Lord Advocate* v. *Maclachlan*, June 13, 1899, 1 F. 917, 36 S.L.R. 727.

Argued for respondents—The Lord Ordinary was right in taking the bonds into account. They had been imposed by the testator himself, and regard should be had to the state of the property at the time. Property meant the net property after deducting any debt—Finance Act 1894, secs. 1, 6 (2), 7 (7); *Earl Cowley* v. *Inland Revenue Commissioners* [1899], A.C. 198, pp. 207, 216, 217, 221.

At advising—

LORD PRESIDENT—The late James Henderson died before the passing of the Finance Act of 1894, leaving, so far as the question in this case is concerned, heritable estate consisting of house property in Glasgow, burdened with an annuity of £750 a-year payable to his widow. The widow died in 1903, and therefore estate duty became due upon the principal value of property passing under section 1 of the Finance Act of 1894, such property being held to be property passing in respect of the provisions of section 2, sub-section (1) (*b*), which is in these terms—"Property passing on the death of the deceased shall be deemed to include the property following . . . That is to say, (*b*), property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit ac

crues or arises by the cesser of such interest." The dispute is as to how the principal value is to be calculated. The rules for determination of value are given in section 7, and the specific case is dealt with under sub-section (7) of that section, which is in these terms—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." The facts about this heritable estate over which the £750 are secured are that the gross value of the estate is reckoned at £120,000 odd, which is just fourteen years' purchase of the rental, deducting feu-duty, ground annuals, and public burdens. But further, there is the fact that the estate is presently bonded to the extent of about £63,000.

The Lord Ordinary sets forth the contention of parties thus—"The Crown suggests an addition of £10,500, which is just the annuity of £750 capitalised at fourteen years' purchase. The defenders, on the other hand, suggest an addition of £4717, 4s. 6d., as bearing the same proportion to the total capital of the trust that the annuity of £750 bears to the income of the trust. He then goes on, not to pronounce directly upon the figures of value suggested either by the Crown or by the defenders, but he states the principles on which the hypothetical addition, quoting the terms of sub-section 7, is to be made. His Lordship says—"In the notes to this rather enigmatical sub-section by the editors of the fourth edition of the late Mr Manson's book I find a suggestion in which I concur. They say—'In the case here provided for, the addition must, it is conceived, be of such a sum as will, at the average rate of income which the actual property is producing, return an income equivalent to the amount of income received in respect of the interest which has ceased.' . . . Now, all this recognises, rightly I think, that regard must be had to the market value of the actual property on which the annuity is charged as at the date of the annuitant's death, and to the actual free income yielded by it as at the same date. Thus, it is impossible to settle the question either by taking an arbitrary number of years' purchase of the annuity or by taking a capital sum which would yield the annuity at any percentage which is merely customary. It is to my mind inconceivable that where the annuity covers the whole income of a property you should be relegated, under section 7 (7) (*a*), to market value, of course after deducting burdens, and that where the annuity covers something less than the whole income you should be free, under section 7 (7) (*b*), to disregard the actual facts altogether." Now, with all this I agree, only noting in passing that the Lord Ordinary is mistaken if he thinks, as he apparently does, although I am not quite sure, that the selection of the number fourteen by the Crown for the years of purchase is an arbitrary selection. But when he proceeds to put these general dicta into concrete form he seems to me to take a new and an altogether inadmissible departure. His interlocutor is—"Finds that in estimating for the purpose of estate duty the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750, payable out of the heritable property forming part of the trust estate, the principal value of an addition to the said property equal to the said annuity must, under section 7 (7) (*b*) of the Finance Act 1894, bear the same proportion to the market value of the said property at Mrs Henderson's death, after deducting the burdens thereon allowed by section 7 (1) of the said Act, as the amount of the said annuity bore to the whole free income of the said property at the said date." Now, in the first place, there is no indication in the statute, and no necessity in the Lord Ordinary's general remarks, that you should attack the question by means of a proportion sum at all, still less that one of the factors of that proportion sum should be the free income of the whole property over which the sum in question was secured. But perhaps the easiest way of demonstrating what is the fallacy of this method is to take it as it stands. If you take x as the principal value of an addition to the said property equal to the annuity, then putting in the form of an equation the proportion stated by the Lord Ordinary, we get it that x multiplied by the free income is equal to the market value of the property minus the bonds multiplied by £750. Now, as this equation must be true for all values, it follows that as you diminish the free income by, for example, supposing a higher rate of interest on the bonds, x must increase. In other words, the less the free income the greater the value of the hypothetical addition corresponding to the annuity, which is absurd.

I therefore discard this proportional method, and revert to what the Lord Ordinary has said as to taking actual facts. The hypothetical addition must be an addition of the same class of property as the property in question. Therefore I think the Crown are right in taking the fourteen years' purchase, because admittedly that is the capital value of this class of property. The truth is that the bonds can never have any effect on the calculation unless they are so large as really to affect the annuity itself, that is, to render it insecure. That would be an answer in fact, because then the annuity of £750 would not truly be an annuity of £750, but only of some less sum. But here there is no such question, for all admit that there was ample margin to secure the £750 being regularly paid. But it was only secured on this class of property, not on Consols or some other first-class security, and therefore I think the Crown are right in being content to calculate the hypothetical addition in the same way as they would have calculated the property itself if it had passed after the date of the Finance Act. I therefore propose to recal the Lord Ordinary's interlocutor,

and find that the value in the circumstances is properly calculated at fourteen years' purchase of £750.

LORD ADAM—The question arises in this case in consequence of the death of Mrs Henderson, who had an annuity of £750 a-year from her husband's estate, and as I understand that annuity was not secured on any specific part of that estate it cannot be held as applicable to the portion of the rent of that estate which otherwise would have gone to this annuity. When Mrs Henderson died, of course her interests, which were life interests, ceased, and the question before us is raised under sub-section 7 of section 7 of the Finance Act of 1894, which relates to the value of the benefit accruing from the cesser of an interest ceasing on the death of the deceased, and sub-section (*b*) says—"If the interest extended to less than the whole income of the property" (which is the case here) it shall "be the principal value of an addition to the property equal to the income to which the interest extended." Now, it is quite true that that is of course applicable to all, but the meaning of it is plain, and, as the Lord Ordinary said in his note, "The parties are agreed that the hypothetical addition to be made to the property is to be something which will be capable of yielding the income to which the interest extended, and they differ only as to the mode in which the addition is to be calculated." The question therefore here is, what is the value of the addition to the estate at the death of Mrs Henderson? Now, I confess that I have not been able throughout this case to see or to understand how the value of the estate can be increased or diminished—how the estate to be added to another estate is to be enlarged or increased—by the fact that the value of the estate to which it is added has been already fixed. Supposing the estate were worth £130,000 and the value after deducting bonds was £100,000, how would that affect the value of the addition to be made to it? If the capital value of £750 annually is to be valued, how is that to be more or less because it is added to the £10,000 or £100,000? It is beyond my capacity to understand that, and accordingly I think that the view that the Lord Ordinary proceeded on is wrong, and that the simple question before the Court is to state what is the value, the capitalised value, of the £750.

Now, I agree with your Lordship also that the fourteen years taken by the Crown is by no means arbitrary. What we find is this—that the value of the whole estate is estimated at fourteen years' purchase of the rents of the property. That is so. If that be so, and if this estate now becomes more valuable by £750 a-year, that is just an addition to the estate of that portion of the rent of that estate which otherwise would have gone to provide this annuity. I think the Crown is right in estimating that the £750 would require fourteen years' purchase of that amount to meet the £750, and by so much the estate would be increased.

LORD M'LAREN—I agree with your Lordships that the mode of valuing the estate suggested by the Lord Ordinary, although apparently plausible, yet does not lead to sound or equitable results. While in this case it leads to a favourable result to the private party, it is easy to see that if the conditions were reversed, if you had property bearing a very large number of years' purchase, the result might be to tax unfairly the person entitled to the reversion of the estate. But the real objection to the method is that it is not the method described by the Act of Parliament. I think that what we have to do is simply to value the addition of benefit to the estate resulting from an annuity falling in, and the only elements are the amount of the annuity and the number of years' purchase at which it has to be valued, having regard to the nature of the security out of which it is paid. I therefore agree with your Lordships that the sum claimed by the Crown is the true sum, and arrived at in a fair way.

LORD KINNEAR—I entirely agree with your Lordship. I think the main error of the interlocutor under review consists of the introduction of the words "after deducting the burdens thereon" into the Lord Ordinary's statement of the sum in proportion. But I agree with your Lordships that it is not necessary or convenient to set it out in the form of a sum in proportion at all. It appears to me that the meaning of the statute is plain enough on careful consideration of the words employed.

In the first place, the particular subject of taxation for the purposes of the present question is to be found in section 2, sub-section (1) (*b*)—"property in which the deceased or any other person had an interest ceasing on the death of the deceased." But then in applying that provision to the particular case in hand, which is the taxation of the property arising from the termination of an annuity of £750 as a yearly charge on the estate, we must keep specially in view the next following words, "property in which the deceased had an interest to the extent to which a benefit accrues or arises by the cesser of such interest." That seems to me to show that the true subject of taxation is not the whole property of course, but that property to the extent to which it has ceased to be burdened by the annuity, because it has been relieved of an annuity of £750 a-year, and to that extent is made subject of taxation. But then when we go to section 7, I think the true principle is brought out with perfectly sufficient clearness by sub-section 7—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall, . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." Now, I cannot say that I have any doubt upon the construction which the Lord Ordinary and all your Lordships have put upon these words, which means that there is to be an addition of a value equal to producing £750 a-year,

Now, the question is whether, in searching for the value of this hypothetical addition, we are to take into account the encumbrances affecting the remainder of the estate; and it appears to me that, taking the Lord Ordinary's principle, which I think perfectly sound, we ought to look at the actual facts of the case. It is plain enough that there is no room for the consideration of the encumbrances on the rest of the property in order to ascertain what the value of an unencumbered addition to the property would be. The whole question is what would be the value of an addition to the property that would produce an annuity of £750. That is the whole problem which is set for us by the statute; and inasmuch as it appears to be clear that the thing to be valued is the interest of the deceased in the estate, the interest which has ceased at her death is an interest of £750 exactly unaffected by any burden. The deceased had no interest whatever in that part of the income which went to pay the debts, but had interest only in that part which went to pay her own annuity of £750. It appears to me, therefore, that the true method of ascertaining the subject of taxation is to see what would be the value of an addition to the estate which, at the average rate of income which the actual property is producing, would return an income equal to £750 a-year. I take these words from the passage quoted by the Lord Ordinary from Mr Manson's work, which I agree with the Lord Ordinary states the rule.

The Court pronounced this interlocutor:—

"... Recall the said interlocutor: Find that the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750 payable out of the heritable property forming part of the trust estate is, under section 7 (7) (*b*) of the Finance Act 1894, the principal value of an addition to the said property equal to the said annuity, and is in the circumstances properly calculated at fourteen years' purchase of the said annuity. . . ."

Counsel for the Pursuer and Reclaimer—Solicitor-General (Salvesen, K.C.)—A. J. Young. Agent—P. J. H. Grierson (Solicitor of Inland Revenue).

Counsel for the Defenders and Respondents—Clyde, K.C.—T. B. Morison. Agents—Webster, Will, & Co., S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, June 27.

(Before the Lord Justice-General, Lord Justice-Clerk, Lords Adam, M'Laren, Kinnear, Kyllachy, and Kincairney.)

KESSACK *v.* MACAULAY SMITH.

Justiciary Cases—Public-House—Breach of Certificate—Licence-Holder being in a State of Intoxication upon the Premises—Licensed Premises after Business Hours.

A holder of a public-house certificate was found, about 3 a.m., upon his premises asleep and intoxicated. *Held* that the proviso in the certificate against, *inter alia*, the holder being in a state of intoxication upon the premises, applied after as well as during business hours, and that a breach of certificate had therefore been committed.

Justiciary Cases—Public-House—Breach of Certificate—Knowingly Permitting Drunkenness within Licensed Premises—Onus of Proving that all Reasonable Steps Taken to Prevent Drunkenness—Licensing (Scotland) Act 1903 (3 *Edw. VII. cap.* 25), *sec.* 98.

A holder of a public-house certificate entertained within his premises after business hours a friend, and they were both found there, about 3 a.m., asleep and intoxicated. *Held* that the holder of the certificate had committed a breach thereof in permitting drunkenness within the premises, he not having discharged the onus imposed upon him by section 98 of the Licensing (Scotland) Act 1903 of proving that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises.

On 26th October 1904 Alexander Kessack, holding a public-house certificate for premises at 19 Cockburn Street, and residing at 64 Marchmont Crescent, Edinburgh, was charged in the Police Court of Edinburgh at the instance of Robert Macaulay Smith, prosecutor for the public interest in that court, that, contrary to the terms of his said certificate and of section 53 of the Licensing (Scotland) Act 1903, upon the night of 30th September and the morning of 1st October 1904, (1) he was found in his said premises at 19 Cockburn Street aforesaid in a state of intoxication; further (2), time and place libelled, he did knowingly permit drunkenness within said premises by allowing Robert Smeaton, residing in Cockburn Street aforesaid, who was then in a state of drunkenness, to remain within said premises.

The Police Judge (MALLINSON) having disposed of various preliminary pleas, and the appellant having pleaded not guilty, adjourned the case till 8th November 1904, when the case went to trial and the accused was found guilty of both contraventions. A modified penalty of £2, 10s., with the