evidence, and it will be the duty of the magistrate, on that objection to the competency of the evidence being taken, to investigate the facts, not by a separate inquiry but by questions being put to the witnesses on both sides on this matter of fact. It will be his business to determine the question of fact, and to give a ruling in law according as he determines that question of fact. The accused will suffer no prejudice from this procedure, which it seems to me is the proper procedure to follow, because if the magistrate decides in fact that the letters were seized unopened, then we have the undertaking of the public prosecutor that in that event the prosecution will be dropped. If on the other hand the magistrate decides—and decides wrongly—that the letters were seized in an open condition, the accused have still their remedy against that wrong decision, because it is not entirely a matter of fact—it is, in my judgment, a mixed question of fact and law. If the accused are dissatisfied with the magistrate's decision on that point, they may come here with proper findings in fact with a question of law appended to a stated case, or they may bring a bill of suspension on the ground that incompetent evidence had been adduced upon which the magistrate had convicted.

Accordingly I agree that the judgment proposed by your Lordship is right, and that the bill of suspension ought to be refused.

The Court refused the bill of suspension.

Counsel for the Complainers—Paton—Gibb. Agents—D. M. Gibb & Sons, S.S.C.

Counsel for the Respondent—Keith. Agent—Andrew Grierson, S.S.C.

COURT OF SESSION.

Saturday, November 17, 1923.

FIRST DIVISION.

[Lord Blackburn, Ordinary in Exchequer Causes.

INLAND REVENUE *v.* FOTHRINGHAM.

Revenue—Estate Duty—Property Passing on Death—Cesser of Annuity Payable out of Heritage under the "Aberdeen" Act (5 *Geo. IV, cap.* 87)*—Value of Benefit Accruing—"Principal Value of an Addition to the Property Equal to the Income to which the Interest Extended"—Finance Act* 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*b*) *and* 7 (7) (*b*).

On the death of an annuitant who was in receipt of an annuity of a fixed amount charged upon an estate, and which did not extend to the whole income of the property, a benefit chargeable with estate duty under the Finance Act 1894 accrued to the owner of the property. *Held* (*diss.* Lord Skerrington), that in calculating the value of the benefit accruing under section 7 (7) (*b*) of the Act, "income" fell to be interpreted as net income after deduction of public burdens and the annual cost of repairs, and that accordingly in ascertaining the number of years' purchase at which the property fell to be valued for the purpose of ascertaining the capital value of an addition thereto equal to the annuity, a sum agreed upon in name of annual repairs formed a proper deduction from the gross rental.

The Finance Act 1894 (57 and 58 Vict. cap. 30) enacts—Section 1—"In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid upon the principal value ascertained as hereinafter provided of all property . . . which passes on the death of such person a duty called 'estate duty.'. . ." Section 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."

The Lord Advocate on behalf of the Commissioners of Inland Revenue, *pursuer*, brought an action against Walter Thomas Scrymsoure-Steuart Fothringham, *defender*, concluding for delivery of a true and full account of the property which passed, or was deemed to have passed, on the death of Dame Hester Mary Fraser or Stewart, widow of the late Sir Archibald Douglas Stewart of Grandtully and Murthly, Baronet, for the purpose of ascertaining the estate duty chargeable in respect of the value of the benefit accruing or arising from the cesser of an annuity of £4000 payable to the said Dame Hester Mary Fraser or Stewart in terms of certain deeds and charges upon the lands of Grandtully or Murthly or others belonging to the defender, and for payment of £8300 or of such other sum as might be found due and payable as estate duty in respect of the value of the benefit accruing or arising as aforesaid. The summons also contained conclusions for delivery of a succession duty account in respect of the cesser of the said annuity, and for payment of £5000 or such sum as might be found due as succession duty foresaid.

Dame Hester Mary Fraser or Stewart was the widow of Sir Archibald Douglas Stewart, Baronet, heir of entail in possession of the entailed estate of Grandtully and Murthly, who by his antenuptial marriage contract and by bond of annuity and disposition in security had burdened the entailed estate with two annuities in her favour under the "Aberdeen" Act (5 Geo. IV, cap. 87). The defender was the successor of the late Sir Archibald Douglas Stewart in the entailed estates now held in fee-

simple by him, the defender, and had by agreement with Sir Archibald's widow restricted the amount of the annuities to a fixed sum of £4000 as being approximately one-third of the free yearly rent or value of the estate. On Lady Stewart's death on 6th October 1916 the annuity ceased.

The defender did not dispute liability for succession duty.

The parties averred, *inter alia*—"(Cond. 4) On the death of the deceased estate duty became payable by the defender in respect of the cesser of the said annuity of £4000 to the extent to which a benefit accrued or arose to the defender thereby. The said estate duty fell to be paid on the principal value of an addition to the defender's property equal to the income to which the said annuity extended. Such principal value for the purposes of estate duty is the price which in the opinion of the Commissioners of Inland Revenue such addition to the defender's property would fetch if sold in the open market at the time of the death of the deceased, and the said principal value fell to be fixed by capitalising the annuity at the number of years' purchase appropriate to the property out of which it was paid. The said method fell to be applied by finding the net annual value of the said whole lands and estates, and by dividing the principal value of the said whole lands and estates by the said net annual value for the purpose of finding the number of years' purchase appropriate to the said whole lands and estates. The principal value of the said addition thereafter fell to be arrived at by multiplying the said annuity by the number of years' purchase so arrived at. (*Ans.* 4) Admitted under reference to section 2 (1) (*b*) and section 7 (7) (*b*) of the Finance Act 1894 that estate duty is payable by the defender in respect of the cesser of the said annuity of £4000 on the death of the deceased to the extent to which a benefit accrues or arises thereby, and that the value of the benefit accruing or arising from the cesser of the said annuity is the principal value of an addition to the property on which the said annuity was charged equal to the income to which the annuity extended. *Quoad ultra* denied under reference to the succeeding answer. (Cond. 5) In December 1920 an estate duty account was lodged on behalf of the defender for assessment of the duty due in respect of the cesser of the said annuity of £4000. The said account set forth the gross principal value of the whole said lands and estates as £213,426, 9s. 5d., which sum after negotiation between the parties was increased to £238,047. This figure the parties are agreed is correct. In reaching the said sum of £238,047 as the principal value of the said whole lands and estates the question of the number of years' purchase applicable to the said whole lands and estates was left unsettled between the Commissioners of Inland Revenue and the defender, correspondence between the parties failing to bring about agreement as to whether or not the average annual expenditure on repairs fell to be deducted from the gross rental for the purpose of finding the net annual value. The said correspondence is produced. The defender submitted in the said account as the net annual value of the whole said lands and estates the sum of £11,484, 6s. This figure was arrived at by deducting from the gross annual value of £13,613, 4s. 11d. feu-duties and public burdens amounting to £2128, 18s. 11d., but not deducting the cost of repairs. On the said figures of £238,047 as principal value and £11,484, 6s. as net annual value, the value arrived at of the whole estate was 20·72 years' purchase, and the value of the addition to the defender's property arising from the cesser of the said annuity £82,914. With reference to the statements in answer, denied that to make a deduction in respect of repairs in ascertaining the principal value of lands is improper and unwarranted by statute or contrary to the principles or practice of valuation. Further denied under reference to the averments above made that the official valuers in their negotiations with the defender disregarded the expenditure on repairs. Sub-section 5 of section 7 of the Finance Act 1894 is referred to for its terms, beyond which no admission is made. *Quoad ultra* the statements in answer are denied so far as not coinciding herewith. (*Ans.* 5) The statements with reference to the accounts lodged for estate duty purposes, the figures condescended on, and the calculations based thereon are admitted. The said correspondence is referred to for its terms. *Quoad ultra* denied so far as not coinciding herewith. The question between the parties is whether the average annual expenditure on repairs falls to be deducted from gross rental in order to arrive at principal value. The defender avers that such a method of ascertaining the principal value of the whole lands and estates is improper, is not warranted by statute, and is contrary to ordinary valuation principles and practice. The effect of making such a deduction is only to increase the number of years' purchase to be taken in arriving at the capital sum. The figure of £11,484, 6s. is agreed as the net rental of the said lands and estates without any deduction for repairs. If the sum of £1038 be deducted therefrom in respect of the average annual expenditure on repairs, as contended for by the pursuer, there is left a figure of £10,446, which at 22·78 years' purchase gives the sum of £238,047. The same result is attained by taking 20·72 years' purchase of the net rental of £11,484, 6s. without making any deduction for repairs. In the negotiations to fix the principal value of the said lands and estates which took place between the defender and the official valuers for the pursuer the expenditure on repairs was disregarded, and the said valuers arrived at the figures of principal value by deducting the amount of public burdens from gross rental and capitalising the net rental thus arrived at by taking as the number of years' purchase thereof a figure which varied with the nature and condition of the subjects under valuation. By the terms of subsection 5 of section 7 of the Finance Act 1894 the principal value of any property shall be estimated to be the price which in the opinion of the Commissioners such pro-

perty would fetch if sold in the open market at the time of the death of the deceased. To estimate the principal value of any property under this provision it is sufficient to know the nature and condition of the property (including therein its state of repair), the gross rental derived therefrom, and the extent of the feu-duties and public burdens affecting the same. The expenditure on repairs is reflected in the present condition of the subjects, and the amount thereof supplies no additional data necessary to the process of valuation. (Cond. 6) The said figure of £11,484 taken by the defender as the net annual value of the whole of said property is erroneous inasmuch as the cost of repairs is included therein. The correct figure for the purpose of calculating the capital value of the addition to the defender's property is £10,446, being the gross rental subject to the deduction, in addition to the said feu-duties and public burdens, of £1038 as the average annual expenditure on repairs calculated at 10 per cent. of the gross rental (less sporting rents and feu-duties). The value of the whole said lands and estates ascertained by the division of the said principal value of £238,047 by the said net annual value of £10,446 is 22·78 years' purchase, and the principal value of an addition to the defender's property equal to the income to which the said annuity extended is for the purposes of estate duty £91,153. (*Ans.* 6) Denied under reference to the preceding answer."

The pursuer pleaded—"1. For the purpose of estate duty the value of the benefit accruing or arising on the cesser of the deceased's annuity is the principal value of an addition to the heritable estate equal to the annuity. 2. For the purpose of ascertaining the principal value of an addition to the heritable estate equal to the annuity, the number of years' purchase applicable to the whole said heritable estate falls to be ascertained. 3. For the purpose of ascertaining the number of years' purchase applicable to the whole said heritable estate (the principal value of which has been agreed between the parties) the average annual expenditure on repairs falls to be deducted from the rental thereof. 5. The principal value of the whole said heritable estate being equal to 22·78 years' purchase of gross rental less feu-duties, public burdens, and the average annual expenditure on repairs, the value of an addition to the said heritable estate should be calculated on the same basis."

The defender pleaded—"2. The value of the benefit arising from the cesser of the said annuity being the principal value of an addition to the property on which the said annuity was charged, equal to the income to which the said annuity extended, the said value falls to be ascertained by capitalising the amount of the said annuity upon the basis of the number of years' purchase applicable to the said property without taking into consideration the amount expended on repairs. 3. The principal value of the defender's property being equal to 20·72 years' purchase of gross rental, less only the amount of feu-duties and public burdens, the value of an addition to the said property should be ascertained on the same basis."

The Lord Ordinary sustained the second and third pleas-in-law for the defender, continued the cause, and granted leave to reclaim.

Opinion.—"The only question in this case is the amount of estate duty payable by the defender, who is proprietor of the estate of Grandtully and Murthly, in respect of the cesser of an annuity of £4000 secured over the rents of the estate in favour of Lady Douglas Stewart, the widow of the defender's predecessor. The amount of the annuity was by agreement between the parties interested fixed at £4000 as being one-third of the yearly rent of the whole estates to which the defender succeeded as heir of tailzie on the death of Sir Douglas Stewart. The annuitant died on 6th October 1916. In order to calculate the duty payable it is necessary in the first place to ascertain the value of the benefit accruing or arising to the defender from the cesser of the annuity. This has to be done in terms of section 7 (7) (*b*) of the Finance Act 1894, which provides that the value shall '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.' It has been pointed out more than once that this section is badly expressed (see *Lord Advocate* v. *Henderson's Trustees*, 7 F. 963), but it is not now disputed that what requires to be ascertained is the value of a hypothetical addition to the property capable of yielding an income equal to 'the income to which the interest extended.' The question between the parties is as to the meaning of the words 'income to which the interest extended.' The defender maintains that this means neither more nor less than £4000, being the amount of the annuity secured on the income or rental of the property. It is, however, argued for the Crown that since an annual outlay on repairs was necessary to maintain the rental of the property required to produce the annuity the 'income to which the interest extended' must therefore be assumed to have exceeded the amount of the annuity by a sum equal to the amount required to be expended on annual repairs in order to maintain a rental of £4000 a year. There is no doubt as to the proper method of ascertaining the principal value of the hypothetical addition, which must of course be assumed to be similar in character to the property to which it is to be added—that is to say, it must be assumed to consist of subjects corresponding to those which form the property itself and bearing the same proportion to one another. What requires to be done first is to ascertain the principal value of the property itself. The principal value of a property is defined by section 7 (5) of the Act to be 'the price which in the opinion of the Commissioners such property would fetch in the open market.' In this case the principal value of the property has been agreed upon and the agreed-on sum must be taken as the fair market price, but the manner in which either party may have

satisfied themselves that the sum agreed upon represents the market price is in my opinion immaterial. I entertain no doubt that the usual method of ascertaining the market price of a property is to add together the values of the different subjects which go to make up the property, and that these values are ascertained by multiplying the gross rental of each subject, under the usual deductions for public burdens, &c., but with no deduction for repairs, by the number of years' purchase appropriate to the subject. The number of years' purchase taken as appropriate to any subject depends always on the character of the subject under consideration; it may vary according to the state of the market and will certainly vary according to the condition of the subject, and it will thus reflect the cost of repairs. So far as I am aware this is the only recognised method of valuing property. I say this because in the course of the debate it was stated that the valuers for the Crown had estimated the principal value of the property by taking the requisite number of years' purchase of the free rental after deduction of 10 per cent. of the rental as the average annual cost of repairs. As I have stated, it is in my opinion immaterial how they may have arrived at the market value, but having agreed on the value I deal with it as if it had been ascertained in the usual recognised manner. Next, in order to ascertain the number of years' purchase of the rental of the whole property under the usual deductions for public burdens, &c., which is required to make up a sum equal to the principal value, it is only necessary to divide the agreed-on principal value by the total rental. Having thus ascertained the number of years' purchase all that remains to be done is to multiply the 'income to which the interest' (which has ceased) 'extended' by the same number of years' purchase in order to arrive at the principal or market value of a hypothetical addition to the property similar in all its component parts to the property itself which will yield an income equivalent to 'the income to which the interest extended.'

"Now, if the Crown's case had been presented logically a figure should in my opinion have been put forward which represented the income of the property to which the annuity of £4000 was said to have extended during the life of the annuitant. I do not know how any larger sum than £4000 could have been reached, but had the endeavour been made, I think the absurdity of the proposition would have been apparent. This is not, however, the way in which the case is presented. Counsel for the Crown opened with the apparently plausible statement that the benefit which accrues to the defender by the cesser of the annuity is a clear £4000 per annum, and that a hypothetical addition which only yields a rental of that amount would not provide the defender with a benefit equal to that which accrues by the cesser of the annuity since an annual outlay on repairs would be required to maintain the rent. The fallacy which underlies this proposition may in my opinion be attributed to the fact that the addition being purely hypothetical requires no additional outlay whatever on repairs, and accordingly the average annual expenditure by the defender on the repairs of his property will continue to be precisely the same as it was during the subsistence of the annuity. The only benefit which accrues to him by its cesser is £4000 per annum.

"Next it was argued for the Crown that if £4000 was taken as the multiplicand in the last operation of ascertaining the principal value of the hypothetical addition, the multiplier, *i.e.*, the number of years' purchase, must be increased so as to increase the principal value of the hypothetical addition to an amount sufficient to produce a rental which would provide the defender with a clear £4000 per annum after keeping the hypothetical addition to his property in repair. To increase the number of years' purchase it is only necessary to reduce the amount of the rental of the whole property by which the principal value of the property is divided, and for this purpose it is proposed to deduct 10 per cent. for repairs from the gross rental in addition to the usual deductions for public burdens, etc. This sum of 10 per cent. amounts in this case to £1038, and is stated in condescendence 6 to be a deduction from the gross rental 'as the average annual expenditure calculated at 10 per cent. on the gross rental (less sporting rent and feu-duties).' The Lord Advocate stated that this 10 per cent. only covered contractual obligations for repairs, but it was not made clear whether the figure is arrived at from the terms of the leases actually current on this property or is taken as an average applicable to such property generally. It does not, however, appear to me to matter whether the sums expended on repairs were expended under contractual obligations or in the ordinary course of good management. The result of this deduction in this case would be to reduce the rental taken as the divisor from £11,484 to £10,446, to increase the number of years' purchase from 20·72 to 22·78, and to increase the value of the hypothetical addition from £82,914 to £91,153. The estate duty on the difference between these two last-mentioned sums is the amount claimed by the Crown and disputed by the defender.

"I am not prepared to hold that an annuity which is secured on the income of a property extends to any greater portion of the income than what is required to provide the annuity. Colloquially speaking the annuitant may be said to have had some interest in what the owner of the property spent on repairs, but she had no right to insist on his spending anything and legally had no interest whatever in such expenditure. Incidentally the annuity in this case was charged on an entailed estate and fell to be fixed without reference to the cost of annual repairs—see *Earl of Galloway*, 6 F. (H.L.) 1. In considering the meaning of the words above quoted from section 7 (7) (*b*) reference may be made to the immediately preceding sub-section (*a*), which provides that the benefit accruing

from the cesser of an interest shall, 'if the interest extended to the whole income of the property, be the principal value of that property.' This I think points to an annuity which extends to the same amount of rental as must be taken into account in calculating the principal value of the property, *i.e.*, the whole rental less public burdens, &c. I do not think it means an annuity which together with the amount spent on repairs exhausts the whole rental. As I have already stated I entertain no doubt that the recognised way of valuing a property is by estimating the number of years' purchase which a prospective buyer would give of the gross rental less public burdens, &c. Accordingly it appears to me that in sub-section (*a*) 'income' must mean rental less the usual deductions and without any deduction for repairs. This view appears to me to be strengthened by the proviso attached to section 7 (5) (now repealed), which provides that the principal value of a property shall not exceed twenty-five times the annual value after making, *inter alia*, 'such deductions as have not been allowed under 'Schedule A of the Income Tax Acts and are allowed under the Succession Duty Act 1853.' The express deductions here allowed are not such as would ordinarily be taken into account in ascertaining 'the annual value' of a property. They are allowed in this proviso only for the purpose of restricting the maximum value and the inference that they are not otherwise to be allowed is I think clear. They include a deduction for repairs under the Succession Duty Act.

"But the question is also, I consider, settled by the decision in the *Lord Advocate* v. *Henderson's Trustees*, 7 F. 963. In that case the property on the rents of which the annuity was secured was burdened with a large amount of debt, and the question was whether in fixing the principal value of the hypothetical addition to the property the gross capital value of the bonds should be deducted from the market value of the property and the annual interest on the bonds should be deducted from the rental before dividing the one by the other in order to ascertain the number of years' purchase. Lord Stormonth Darling (Lord Ordinary) held that the gross capital value of the bonds should not be deducted from the market value of the property, but that the interest on the bonds was a proper deduction from the rental, thus holding that the income of the property for the purpose of section 7 (7) (*b*) meant the free income after deduction of the interest on the bonds. He then proceeded to ascertain the value of the hypothetical addition by a proportional sum in which the other three terms were the principal or market value of the property, the free income of the property as defined by himself, and the amount of the annuity which had ceased. The First Division held that the Lord Ordinary was wrong in allowing the interest as a deduction from the rent. His proportion sum was reduced to an equation by Lord President Dunedin (page 969 foot) with the result of exposing very clearly that the greater the amount of the debt on the property the less would be the free income, and accordingly the greater the value of the hypothetical addition, which, said his Lordship, 'is absurd.' The proportion sum was therefore rejected as not leading to sound results. But as this raises a question of mathematics rather than of law I venture to agree with Lord Stormonth Darling that the method described in the statute of arriving at the value of the hypothetical addition can be stated quite accurately as a proportion sum, which so long as the terms of the sum are correct does not lead to an unsound result. Where Lord Stormonth Darling went wrong was in introducing a wrong term in what he took as the 'free income,' and that alone led to the absurd result. The method approved by both parties in this case as the proper method for ascertaining the value of the hypothetical addition is just a proportion sum, viz., as the market value of the property is to the rental of the property, so is the value of the hypothetical addition to the annuity which has ceased. But the Crown seek to make the same blunder as was made by Lord Stormonth Darling in claiming to make a deduction for repairs from the rental, and this leads to a similar absurdity — for the more generous the proprietor of a property is in the matter of repairs, whether these are matter of contract or not, the greater will be the value of the hypothetical addition. So long as the rent taken as one of the terms is subject only to deduction of such public burdens as are fixed and ascertainable the proportion sum will lead to no absurdity. The moment you introduce variable and optional deductions from the rent it will. Accordingly in my opinion the defender's contention in this case is consistent with the true meaning of the statute and is supported by authority, and I shall meantime sustain the second and third of his pleas-in-law.

"I should perhaps point out that it is quite clear that in *Henderson's* case the Crown did not claim, as they now do, any deduction from the rent for repairs. The only explanation of the apparent change in practice was a statement by the Lord Advocate that it must have been an oversight, as, so he was informed, the invariable practice has always been to make such a deduction."

The pursuer reclaimed, and argued—Section 2 (1) (*b*) of the Finance Act 1894 had created an artificial position. Although no property actually passed on the cesser of the interest, property was to be deemed to have passed. Such property could not be valued in the ordinary way, and accordingly a method of valuation had been provided by section 7 (7) (*b*), and the question was one of the interpretation of the section —*Attorney-General* v. *Coole*, [1921] 3 K.B. 607; *In re Earl Cowley's Estate*, [1898] 1 Q.B. 355. It had been settled in *Lord Advocate* v. *Henderson*, 1905, 7 F. 963, 42 S.L.R. 720, that the proper method of applying the section was to multiply the annuity by the number of years' purchase value of the property bur-

dened, obtained by dividing the capital value of the property by the rental. In that case, however, the question as to whether the rental to be taken for the purpose of the calculation was the gross rental or the net rental after deduction of the cost of repairs did not arise. But in section 7 (7) "income" was used in the sense of net income. This was clearly so in sub-section (*a*), under which, if the interest amounted to the whole of the net income, the value of the benefit accruing was the value of the whole estate. The same meaning fell to he given to "income" in sub-section (*b*). Further, the ordinary meaning of "income" was income after the cost of earning it had been deducted. An "addition to the property equal to the income to which the interest extended" must therefore mean an hypothetical estate which would produce a free income equal to the annuity—*Attorney-General* v. *Coole* (*cit.*), *per* Sankey, J., at p. 619; *Lord Advocate* v. *Maclachlan*, 1899, 1 F. 917, *per* Lord President at p. 922, 36 S.L.R. 727. The cost of repairs therefore fell to be deducted from the rental in calculating the number of years' purchase of the property. This was in accordance with the ordinary practice in calculating the annual value of an estate—*Edinburgh and Glasgow Railway Company* v. *Hall*, 1866, 4 Macph. 1006, *per* the Lord Justice-Clerk at p. 1008, 2 S.L.R. 159; *Attorney-General* v. *Power*, [1906] 2 I.R. 272, *per* Palles, C.B., at p. 277; *In re Elwes*, 1858, 3 H. & N. 719, *per curiam*, Watson, B., at p. 716. There was no hardship on the owner of the property because he was benefited by the addition of the amount of the annuity, which had not hitherto carried its share of repairs. On the other hand the deceased was clearly interested in the property being kept in repair.

Argued for the defender—As a taxing statute the Finance Act of 1894 should be interpreted in cases of ambiguity in favour of the subject, and the onus was on the pursuer to show that "income" meant net income if the result was to make the duty greater. The pursuer had failed to do so, and "income" therefore fell to be interpreted as gross income in both sub-sections of section 7 (7). It was doubtful if the defender had been right in conceding the deduction of public burdens although they were a charge on the income prior to the annuity. The cost of repairs, however, should not be deducted. It was not deducted in finding the free year's rental—*Earl of Galloway* v. *Countess of Galloway*, 1903, 6 F. (H.L.) 1, 40 S.L.R. 82. The "addition to the property equal to the income to which the interest extended" therefore fell to be calculated on the basis that "income" meant income without deduction for repairs, and it was the rental, without any such deductions by which the capital value of the property was to be divided in order to ascertain the number of years' purchase value. The necessity of express provision for deduction of the cost of repairs in section 5 supported this contention, and the cases of *Lord Advocate* v. *Maclachlan* (*cit.*), *per* Lord President at p. 922, and *Lord Advocate* v. *Henderson* (*cit.*), *per* the Lord President at p. 970, were in its favour. The pursuer's contention led to the result that if the free income of the whole estate was diminished owing to increased cost of repairs the amount of estate duty payable in respect of the cesser of the annuity was increased. In *Edinburgh and Glasgow Railway Company* v. *Hall* (*cit.*) the question was one of income tax, and the Lord Justice-Clerk was using the words "annual value" in a particular sense. The other cases cited by the pursuer were not in point. The Lord Ordinary's interlocutor should therefore be sustained or a proof should be allowed as to the practice in such valuations.

LORD PRESIDENT (CLYDE)—The late Lady Douglas Stewart was entitled to an annuity secured over the property of Murthly. The interest which as annuitant she had in the property ceased on her death on 6th October 1916. By section 1 of the Finance Act 1894 estate duty is payable in the case of every person dying after the commencement of the Act upon the principal value of all property which passes on the death of such person; and by sub-section (1) (*b*) of section 2 "property passing on the death of the deceased" is deemed to include "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."

Accordingly the Murthly property must be deemed to have passed on the death of Lady Douglas Stewart to whatever extent (if any) a benefit arose or accrued by the cesser of her interest. The question whether a benefit has or has not arisen is crucial to the incidence of estate duty. If no benefit arose there is no property subject to duty. It is obvious *prima facie* that some benefit did arise or accrue in respect of the release of a property worth nearly £240,000 and having a rental of over £13,000 gross, or £10,000 net (that is, after allowing for public burdens together with ordinary and necessary repairs), from the burden of an annuity of £4000. The next question, closely related to the first is—What was the extent of the benefit? This is a question of valuation, and the statute provides, in sub-section (7) of section 7, two special rules, (*a*) and (*b*), for valuing the benefit. Which of these two rules is applicable in any given case depends, according to their terms, on the result of a comparison between the extent of the deceased's life interest and "the whole income of the property." Rule (*a*) applies to the case in which the "interest extended to the whole income of the property," and directs that the value of the benefit arising or accruing from the cesser of the interest shall be taken to be "the principal value of the property '—which means (according to sub-section (5) of section 7) the market value of the property as at the death of the deceased. Rule (*b*) applies to the case in which the "interest extended to less than the whole income of the property," and directs that the value of the benefit shall be taken to be

"the principal value of an addition to the property equal to the income to which the interest extended."

The whole dispute between the parties is as to the meaning of the word *income* occurring in these rules. The Revenue maintains that by *income* the *net income*—after deduction of public burdens together with ordinary and necessary repairs—is meant. The Lord Ordinary has held that what is meant is the *net income*, after deduction of public burdens only. The respondents, while they did not challenge the Lord Ordinary's findings, argued after some hesitation that the true construction to be put on the word *income* is *gross income*. Perhaps I should explain that I have used the expression "public burdens"—as the parties themselves did—to include feu-duties.

The difference between the Revenue and the respondents does not actually come into view in determining which of the two rules is applicable to the present case. For they are agreed that it is the second of the two which applies. But this is only because it happens that the extent of Lady Douglas Stewart's interest in the Murthly property—viz., £4000 a-year—is less than the whole income of the property, whether that income be reckoned *gross* or *net*. The difference shows itself, however, the moment the second of the two rules comes to be applied. The parties were, I think, agreed in reading the expression *equal to* (used in that rule) as meaning "equivalent or corresponding to." Such, at any rate in my opinion, is its meaning, for the "principal value of an addition to the property" cannot be equated with "the income of the property to which the interest extended" except by using the capital equivalent of the proportion of the income thus defined. Now it makes a material difference to the process of capitalisation whether the income to be capitalised is gross or net, and if net, what are the deductions to be made before striking it.

The question thus raised is one of pure statutory construction, and for its solution it is reasonable to use the statute as its own interpreter, selecting that one of the three possible meanings attributed to the word *income* which accords best with the statutory scheme of which sub-section (7) of section 7 forms part, and makes the statute consistent with itself. The hypothetical conceptions introduced into the Finance Act 1894 may make this—the ordinary—method of statutory construction less easy than in other taxing Acts which adhere more closely to actualities. But if the main conception—hypothetical though it be—which runs through sub-section 1 (*b*) of section 2 and sub-section (7) of section 7 is once clearly grasped, the answer to the question does not seem to me to present much difficulty.

Sub-section (7) of section 7 is a valuation clause, not a charging clause. The subject of valuation is the *benefit* (referred to in sub-section 1 (*b*) of section 2) arising or accruing from the cesser of an interest the existence and extent of which *benefit* determines according to the last-mentioned enactment what proportion of the property in which the interest was shall be deemed to have passed on the death of the deceased and so to attract duty. Now a *benefit* implies advantage or profit of some kind. Suppose a house or tenement of houses to be situate in a locality where the demand for houses is restricted and offers no prospect of improvement. Suppose further that the house or tenement is the subject of what is known in the law of Scotland as a "proper" liferent—the simplest example of a life interest. Finally, suppose that at the date of the death of the liferenter the *gross income* from the property can be shown—alike in the light of past experience and on any reasonable conjecture of the future—to be such as barely to meet the public burdens and the cost of ordinary and necessary repairs. What *benefit* could be imagined to arise or accrue in these circumstances by the cesser of the life interest? It would be no *benefit* to a fiar or other person entitled to the reversionary interest to step into the shoes of the liferenter as the person liable in payment of the public burdens; and equally it would be no *benefit* to become entitled to ingather a *gross income* whereof the balance after the public burdens had been met must be spent in ordinary and necessary repairs, as the indispensable condition of preserving the property itself from perishing of neglect and becoming a total loss. It seems clear that in the case figured the fiar or other reversioner would be no whit better off after the death of the liferenter than before it—in short, no benefit would arise or accrue by the cesser of the life interest precisely because no *net income* was set free by the death of the deceased. And in that case there would be nothing to value under sub-section (7) of section 7. A precisely similar course of reasoning leads to the conclusion that when a benefit does arise or accrue it arises or accrues only to the extent to which the *net income* of the property is set free by the death of the deceased. In that case there does arise or accrue a *benefit* to be valued according to one or other of the rules in sub-section (7) of section 7. The only question in the case may thus be said to answer itself; *income* means beneficial income, that is to say, *net income*, after public burdens and the cost of ordinary and necessary repairs have been met.

If this is sound the valuation rules become intelligible notwithstanding their highly artificial character. If the life interest extended to (or absorbed) the whole *net income* of the property, the value of the *benefit* is to be reckoned as the market value of the property. If the life interest absorbed only part of the *net income*, the value of the *benefit* is to be reckoned as the market value of an addition (or increment) to the property corresponding to the proportion of the *net income* which the life interest absorbed. The operative part of the second of these rules might, I think, have been expressed thus—the value of the *benefit* is to be reckoned as a proportion of the market value of the property equal to the proportion of the *net income* absorbed by the life interest. The draftsman has

(not unnaturally as it appears to me) conceived the release of the property from the burden of the life interest as an addition (or increment) to the property itself capable of estimation at market value. But the Revenue maintain that it is necessary for the proper interpretation of the section to figure this addition in the shape of a separate and independent estate—in character such as to present a microcosm of the Murthly property, and in size such as to bear a sufficient income to produce the £4000 a-year to which the deceased annuitant was entitled. The argument of course was that this income must be *net* and not *gross*, because the annuity of £4000 was payable *net*. I am not at all sure that the idea of an "addition to the property" was intended by the draftsman to take this somewhat fanciful shape. For the cesser of a life interest does involve an addition or increment to the property in the hands of the fiar or other reversioner; and there is nothing impossible or out of the way in figuring the market value of that addition or increment as a value which corresponds in amount with the proportion of the *net income* set free. I do not say that the view so strongly insisted in by the Revenue is wrong; indeed I think it results in the same conclusion at which I have arrived by a different road. But, for reasons which I need not elaborate, I distrust the reliability of the microcosmic conception involved in it, and I confess that the addition of another to the already sufficiently numerous fictions which obscure the construction of the Act of 1894 brings more confusion than enlightenment to my mind. I prefer, therefore, to rest my judgment on what humbly seem to me to be broader and simpler grounds. It will be observed that according to those grounds the same meaning is given to the word *income* wherever it occurs in sub-section (7) of section 7, and that that meaning makes the valuation section a consistent and harmonious adjunct to sub-section (1) (*b*) of section 2, the relative charging section.

The Lord Ordinary has drawn a distinction between public burdens and repairs, and holds that *income* means *net income* after meeting the former only. It is right, however, to explain that counsel for the respondent did not present any argument in the Outer House in support of the view that *income* should be construed as meaning *gross income*. The Lord Ordinary says that repairs are variable and optional. They are not, however, difficult of ascertainment for valuation purposes at an annual average figure sufficient to meet ordinary and necessary upkeep. In the present case that has been done, and the figure agreed on is 10 per cent. of the rental, purely sporting subjects excluded. Ordinary and necessary repairs are optional only in the sense that if an owner chooses to allow his property to become a ruin or a desert under the operation of the laws of nature there is nothing in the law of Scotland to prevent him. But ordinary and necessary repairs are the price which must be paid for preserving a property in existence. They are *incommoda* which are essential according to the nature of most (though not of all) kinds of real property, to prevent the loss of them, and to enable them to bring any *commoda* whatever to their owner. The gain sought by saving on ordinary and necessary repairs is only another aspect of the loss consequent upon the inevitable deterioration of the property, and could not, as I understand the Act of 1894, be brought within the category of a *benefit*.

The circumstances of the Murthly property and the method adopted for its valuation create no difficulty in arriving at the correct number of years' purchase to be applied to the net income of the property, or to that proportion of it to which the annuity extended, viz., £4000. I think, therefore, the contention of the Revenue should prevail.

LORD SKERRINGTON—The only question which we have to decide is whether in carrying out the calculation prescribed by section 7 (7) of the Finance Act 1894 an allowance for repairs ought to be deducted from the gross income of a landed estate as was contended for by the Inland Revenue. The defender, following the example of the defenders in the case of *Lord Advocate* v. *Henderson's Trustees* (7 F. 963), conceded in his third plea-in-law that feu-duties and public burdens ought to be so deducted, and this plea has been sustained by the Lord Ordinary. The sole question argued before the Lord Ordinary was whether repairs could be assimilated to feu-duties and public burdens. He decided this question in the negative and in favour of the defender. While I do not agree with all his reasoning, I think that he came to a correct conclusion upon the only question which he was asked to consider. When the case came to the Inner House the defender's counsel argued with no great confidence as it seemed to me that the judgment reclaimed against might be supported upon a broader ground, which if sound would lead to the conclusion that neither feu-duties nor public burdens nor repairs ought to be deducted from gross rental for the purposes of section 7 (7) of the Finance Act 1894. This argument was of course still open to them but only for the purpose of supporting and not of altering the Lord Ordinary's interlocutor.

The broader argument which the Lord Ordinary was not asked to consider is as follows:—The purpose of section 7 (7) of the Finance Act 1894 is to provide a formula for valuing the benefit accruing or arising from the cesser of an interest in property which must by section 2 (1) (*b*) be deemed to have passed on the death of a person who died after 1st August 1894. In the present case we have to value the benefit accruing to a landowner from the cesser by the death of the annuitant of a free life annuity of £4000 charged upon the rents of his estate by a former heir of entail under the powers of the Aberdeen Act. The annuity so granted was for more than £4000, but it was restricted after the death of the granter to a sum which the parties agreed to be one-third of the free rental of the estate. Accordingly the annuitant's interest in the

rental of the estate "extended" to the sum of £4000 per annum. The formula for valuing the benefit sustained by the landowner in a case like the present is exceedingly artificial. It requires us to resort to no less than three legal fictions, of which two are highly advantageous to the Inland Revenue, whereas the third, being of advantage to the taxpayer, is as it appears to me tacitly repudiated by the Inland Revenue. The first fiction is that the benefit accruing to a landowner through the death of an annuitant is the same whatever may be the age of the annuitant. The second fiction is that the benefit to a landowner can be measured by the market price of the property, and that it is equal either to the whole market price or to an aliquot part of the market price according as the annuitant's interest extended to the whole income or only to a part of the income. The market price of a property may be exceptionally great owing to the supposed existence of undeveloped minerals, and it is not easy to understand why in such a case the cesser of a life annuity of fixed amount should be supposed to confer an exceptionally great benefit upon the landowner who already possessed during the annuitant's life full power to develop his estate as he might choose. The third fiction has to do with the mode of ascertaining the fraction which when applied to the market price will give the statutory value of the benefit accruing to the landowner from the cesser of a life annuity of fixed amount but not exhausting the full rental of the property. The general meaning of the sub-section is clear enough. The fraction for which we are searching must depend upon the proportion which the income to which the annuitant's interest extended bears to the whole income of the property. In the present case I did not understand it to be disputed that the annuitant's interest in the income extended to the annual sum of £4000 neither more or less. Counsel for the Inland Revenue, however, pointed out quite justly that the annuity was a "free" one, and that it was not clogged with any corresponding legal liability for feu-duties or public burdens or with any responsibility for the upkeep of the estate. In short, upon the death of the annuitant the landowner became richer by £4000 a year without suffering any addition to his liabilities and responsibilities as a landowner. This consideration is so obvious that it cannot have escaped the attention of the Legislature. One way of meeting the difficulty would have been to enact, as has been done in other departments of legislation, that certain enumerated deductions should be made from the gross rental and that the amount of each deduction should be calculated in the way directed by the statute. This course was not adopted, but another, and as it seems to me a simpler and more convenient, device was resorted to by means of a third legal fiction. Having ascertained that the annuitant's interest in the income extended to £4000 a year, we are directed to regard this sum not as a free liferent annuity but as the income of a property similar in all respects to the property over which it was secured. It so happens that the property in the present case consists of land in the county of Perth. Accordingly an annual sum which as enjoyed by the annuitant was terminable on her death, but which on the other hand was exempt from the burdens affecting landownership must now be regarded as something very different, viz., as the permanent income of a landed property forming an "addition" to the estate of Murthly, and therefore as clogged with liabilities and responsibilities similar *pro rata* to those applicable to the income derived from Murthly. One of the objects of this legal fiction was, in my opinion, to avoid difficulties of the kind now raised by the Inland Revenue. If this view be sound, the lapsed annuity of £4000 ought to have been compared with the gross rental of the estate of Murthly without any deduction therefrom.

I shall now consider the case as it was argued to and disposed of by the Lord Ordinary. The question is whether, assuming that feu-duties and public burdens ought to be deducted from the gross rental for the purposes of section 7 (7) of the Finance Act 1894, an average annual sum in respect of repairs ought also to be deducted.

Feu-duties and public burdens are often referred to as burdens upon the rental of an estate, but this is not a strictly accurate expression as appears from the case of *Prudential Assurance Company* v. *Cheyne* ((1884) 11 R. 871), relating to a feu-duty, and the case of *Argyll County Council* v. *Walker* (1909 S.C. 107), which had to do with a local rate. It is difficult, however, to suppose that the construction and effect of the sub-section depend upon technicalities such as those which the Court had to consider in these two cases. If the practice of deducting feu-duties and public burdens from the gross rental of heritable property is assumed to be in conformity with the true intent and meaning of the sub-section the only reason which occurs to me is the broad consideration that feu-duties and public burdens are annually recurring debts which a person is under a legal obligation to pay in respect of the ownership of heritable property without any option or discretion on his part in regard to the time or the amount of the payment. If that is the principle which justifies the deduction of feu-duties and public burdens from the gross rental of a landed estate, it seems to me to have no application to the deduction now claimed by the Inland Revenue. Apart from exceptional cases such as that of a proper liferenter, who in this connection may be regarded as an owner, a landowner is under no legal obligation to keep his estate in proper repair. Nor is it always necessary that he should do so from the point of view of prudent estate management, as he may have it in view to replace an old building by one which is more suitable, or to alter the manner in which his property has hitherto been utilised. These may be represented as exceptional cases, but the fact remains that the amount expended by

a landowner upon repairs, and the time when such repairs are executed, depend in great measure upon his own discretion when applied to circumstances which may vary greatly from year to year. The pursuer seeks to meet this difficulty by taking an average of the amount actually expended by the defender upon repairs during some particular period which I assume to have been immediately prior to the death of the annuitant. Estimates of this kind are useful for various purposes, but they seem to me to be quite out of place in the case of a taxing statute which makes the income of a particular year a factor from which the amount of a tax is to be calculated. Assuming it to be established *aliunde* that repairs constitute a proper statutory deduction, I see no warrant for striking an average, though it might have been fair both to the Inland Revenue and to the taxpayer that this course should have been expressly authorised. Where, however, the question is whether the statute does or does not sanction a deduction in respect of repairs, the essentially fluctuating and varying amount of such expenditure affords a strong argument in favour of the view that no such deduction was intended to be authorised. The force of this argument is not weakened by pointing out that the position is different (in appearance at least) if the crucial fact is disguised in the manner proposed by the pursuer. His counsel encountered a similar difficulty when he was asked whether his argument would not justify a deduction in respect of renewals, insurance, and management—objects which in the ordinary case are just as necessary as are repairs if the rental is to be maintained and the landowner is to receive the benefit of it. Expenditure of this kind can be and often is estimated on an average of years in the manner proposed by the pursuer. No satisfactory answer was given to this question.

Upon both the broader and also upon the narrower ground I think that the interlocutor reclaimed against should be affirmed.

LORD CULLEN—The annuity enjoyed by the deceased Lady Douglas Stewart was £4000 per annum. The annual rental or income of the entailed estates, whether taken gross or net, was of much larger amount. The case is therefore one which clearly falls under section 7, sub-section 7 (*b*), of the Act of 1894. The provision applicable to it runs thus — "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . 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 provision in so far as it speaks of "an addition to the property equal to the income to which the interest extended" is not happily worded. According to the ordinary use of language the words "an addition to the property" signify a capital addition. An expansion or enlargement of the rental or income derived from a property would not be spoken of as an addition to the property. From this point of view the words "equal to the income" are elliptical, and the required paraphrase would be, as suggested in the case of *Attorney-General* v. *Power* ((1906) 2 I.R. 272), "an addition to the property yielding an income equal to the income to which the interest extended." Another view advanced in argument was that the words "an addition to the property" are employed in an unusual sense so as to mean an enlargement of the income derived from the property by the person to whom the benefit accrues or arises through the cesser. I do not clearly see that this reading would in the end lead to a different result in the estimation of the value of the benefit accruing or arising. I prefer, however, the other reading owing to the difficulty I feel in taking the words "an addition to the property" otherwise than as meaning a capital addition.

So taking them, one is bidden by the statute, *modo calculandi*, to figure the cesser of the annuity as making a capital addition to the property, *i.e.*, the entailed estates, yielding an income equal to the annuity—that is to say, an income of £4000 per annum. And then one is bidden to find the capital value of such a hypothetical addition to the estates. The hypothetical addition must, I take it, be regarded as homogeneous in income-producing capacity with the property to which it is hypothetically added. And the calculation of its principal value may be conveniently thrown into this form — If the property with an income x has a principal value of so much, what is the principal value of a homogeneous addition with an income of y?

As I followed the argument, the parties were not in dispute about the suitability of this formula. The controversy came to turn on the word "income" used in it, and the reason for this is that in the case of the property the gross income is subject to certain necessary deductions before one reaches the net income which is of benefit to the defender, while in the case of the hypothetical addition the income thereof, *i.e.*, the annual amount of the annuity, is a clear income subject to no such deductions, and therefore all of benefit to the recipient. This difference leads the defender to contend that the word "income" in the statutory provision in question means gross income. This contention if sound would lead to a result more favourable to him than that contended for before the Lord Ordinary, and in his pleadings where his calculation of principal value proceeds on a comparison of the annual amount of the annuity, not with the gross income of the property, but with a net income thereof arrived at after deducting feu-duties and annual public burdens.

The statute contains no definition of the word "income." But it is clear to my mind that in making valuations for the purposes of duty under the Act the word cannot be taken as meaning gross income irrespective of charges necessarily to be defrayed therefrom before any benefit accrues or arises to the recipient. What has to be valued is the

benefit accruing or arising. Now let it be supposed that the property charged with this annuity of £4000 yielded a gross income of £8000. The annuitant would have taken a clear £4000 per annum. The defender would have taken the other £4000, but would have had to defray therefrom certain necessary annual charges. Clearly in point of annual benefit the annuitant would have been in the better case, and on the cesser of the annuity the annual income from the property beneficial to the owner would be not merely doubled but more than doubled. No doubt, from a capital point of view the annuity has *quoad* the annuitant the element of inferior value—that it is temporary. But according to the Act its cesser is to be treated as amounting to a permanent accrual of benefit to the person who benefits by the cesser.

Accordingly as it is the value of the benefit accruing or arising that is to be valued, I am unable to adopt the defender's contention that it is the gross income of the entailed estates which is to be taken for comparison, *modo calculandi*, with the annual £4000 of the annuity.

There remains, however, for consideration the alternative contention for the defender, adopted by the Lord Ordinary, which is to the effect that if the calculation is to proceed on the net income of the estates, such net income should be reached by deducting from gross income only feu-duties and annual public burdens and not deducting anything for repairs. On this alternative view the defender admits the deduction of feu-duties and public burdens because the payment of them is necessary and the amount taken out of gross income to meet them is not of benefit to the defender. But he differentiates repairs as being, in the words of the Lord Ordinary, "optional and variable." They are certainly variable. But in the case of landed estates such as we are dealing with, as in the case of other kinds of heritable property, there is a burden of repair which is necessary and not optional if the property is to maintain its income-producing capacity. The calculation of principal value here proceeds on the basis of an income which it is assumed will be maintained, and in order so to maintain it expenditure on repairs is unavoidable. The fixing of a standard of necessary repair is a familiar enough topic with men of skill and experience. Here the parties are on record agreed in saying that £1038 represents the average annual expenditure on repairs *de facto* over a series of years. This is not quite the same thing as saying that £1038 is to be taken as the average annual amount of necessary repairs, but I understood counsel to be agreed at the bar that it might be so taken in the event of the calculation of principal value falling to proceed *quoad* repairs on the footing contended for by the Crown. I am of opinion, for the reasons above indicated, that it should so proceed, and that the claim made by the Crown is entitled to prevail.

LORD SANDS—The estate of Murthly to which the respondent succeeded as heir of entail was burdened with an annuity of £4000 per annum in favour of Lady Stewart, the widow of his predecessor. In virtue of the provisions of the Finance Act of 1894 the respondent became liable on the death of Lady Stewart in estate duty in respect of the cesser of the right of Lady Stewart and the consequent release of the estate from this burden. An annuity, particularly when the annuitant as was here the case is an old lady, may be of small capital value in relation to its annual amount, and therefore, when regarded as a capitalised charge, be a comparatively small encroachment upon the capital value of whole estate. But in calculating estate duty under the Act of 1894 no account is taken of this consideration. The annual burden is treated, not as a temporary one, which it is, but as if it were a permanent charge. This apparently harsh rule is in accordance with the policy of the Act, which is to levy a toll not upon succession but upon every passing of property in respect of death. If the cesser of a life interest were not to be treated as the passing of the capital value of that life interest, it would not be difficult so to arrange the transmission and the burdening of family estates that the levy of the toll would take place at intervals much longer than each expiry of enjoyment according to the average chances of human life. Accordingly in such a case as the present it is necessary to ascertain the capital value at the date of death equivalent to a perpetual annual payment of the amount of the annuity. This will depend upon two things—the value of money at the time of the annuitant's death, and the nature of the security afforded by the estate out of which the annuity is payable. An annual payment of £1000 a-year chargeable upon the revenue of an estate in Consols will have a much larger capital value than an annual payment charged upon the revenue from a coal mine.

The directions of the statute as to the calculation of the capital and the taxable value of the cesser of an interest are contained in section 7 (7) of the Act of 1894. Two cases are contemplated—where "the interest extended to the whole income of the property," and "where the interest extended to less than the whole income of the property." In the former case the value of the benefit accruing from the cesser of the interest is to be the principal value of the property. This is readily intelligible. The fiar was getting nothing; now he gets an interest which extends to the whole income of the estate. As regards duty his liability is the same as if the person enjoying the life interest had been a fiar and he had succeeded to him. It was submitted I think on both sides of the bar that this provision is applicable only when the legal extent of the life interest is the whole income of the property, and is not applicable if this is not the legal nature of that interest, even though *de facto* that interest exhausts the whole income of the property. I have, I confess, great difficulty in accepting this view. Only two cases are contemplated, and the other case is where "the

interest extended to less than the whole income of the property." Now, if one figures the case of a widow who has been left not the liferent of a property but an annual sum payable out of the rents of a property, and this annuity proves to be greater in amount than the rents, so that she has to suffer an abatement, I am at a loss to understand how this can be described as a case "where the interest extended to *less than the whole* income of the property." Nor do I see how the rule of case 2 can reasonably be applied in such circumstances unless indeed it be applied in such a way as to bring about the same result as in case 1, viz., that the duty is chargeable on the whole value of the estate.

It is unnecessary, however, for the purposes of this case to determine that question, for there is here no question of an interest which extended to the whole income of the property. When it does not do so the benefit accruing is (section 7 (7) (*b*)) to "be the principal value of an addition to the property equal to the income to which the interest extended." This language is obscure and cannot be read literally so as to make sense. My primary impression of the construction coincided with what was suggested by Mr Robertson for the respondent, viz., that the language is elliptical, and that the true reading is—"The principal value of an addition to the income of the property equal to the income to which the interest extended." This reading appears to me to yield a simple and intelligible result, and it also squares with the words "the principal value of" better than any other reading. "Principal value of" suggests something annual of which it is the principal or capital value. The other reading, for which perhaps there is a measure of obiter authority, is that the true reading is—"The principal value of a hypothetical addition to the property yielding an income equal to the income to which the interest extended." This was interpreted, as I understood, as meaning "the hypothetical addition to the property of an extra piece of property yielding an income equal," &c. It may be my lack of imagination, but this hypothetical extension of territory seems to me a confusing idea. In the case of a house it would necessitate a hypothetical extra storey or wing; in the case of an island property a hypothetical volcanic convulsion.

But either reading I think leads eventually to the same result. What is to be got at is the capital value of the annuity figured as payable out of property identical in character with that out of which it is at present paid. In the case of *Lord Advocate* v. *Henderson's Trustees* (7 F. 963) Lord Stormonth-Darling expresses it thus — "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." With that dictum I respectfully concur, although, as it appears to me through what I cannot but regard as a lapsus, Lord Stormonth-Darling failed to give effect to it in his judgment. I venture to think that the criticisms to which his Lordship's method of a sum in proportion were subjected in the Inner House were coloured by the fact that he made a mistake as to the factors, for the problem was eventually solved in the Inner House by what was really a sum in proportion. But is any sum in proportion necessary? I think not. It is a convenient way of arriving at a figure for the year's purchase to be applied in estimating the capital value of income which would be derived from land of the particular estate, but it is no more. It is not in my view strictly necessary to value the whole estate at all. If a valuator, mutually chosen, were without valuing the whole estate to return the opinion, "I think twenty years' purchase the proper figure for the estate," that would supply the necessary factor.

But of course before he determined the factor the valuator would have to be instructed—it is a question of law and not for him—what kind of rent he was to contemplate in fixing the years' purchase. Was it the gross rent, or the rent less rates, &c., or the rent less rates, &c., and the burden of repairs? His determination as to years' purchase would vary according to the instructions given him. This consideration leads directly to the real question at issue in this case. Is the income which is to be capitalised the gross income or the net income? The middle view, that rates, &c., are to be deducted but not repairs, seemed to be abandoned argumentatively by the respondent. According to the reclaimer the question to be answered is, What is the capital value of land such as the estate of Murthly, yielding £4000 of net rental? According to the respondent it is, What is the capital value of land such as the estate of Murthly, yielding £4000 gross rental?

I have come to be of opinion that the former is the true question under the Finance Act of 1894.

The thing which is charged under section 2 (*b*) is "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." Now, as I have already indicated, under the scheme of the Act the temporary character of the interest that expires is an irrelevant consideration. The interest to be valued is to be treated as if it were a permanent annual charge. The successor is to be treated as benefited by the capital amount of this annual interest regarded as a perpetuity. But the annual interest in the present case was £4000 net, and in my view that is the measure of the benefit. I am unable to regard the income referred to in section 7 (7) (*b*) as other than this annual interest. It has to be kept in view that though this happens to be a case of an estate in land the charge might be on moveable estate such as stocks and shares, and section 7 (7) (*b*) applies equally to such a case. In such a case there would in general be no difference between the gross and the net return. The successor would pay duty upon a sum calculated according to the amount of the benefit accruing to him by the enlargement

of his income. It is no doubt within the competency of the Legislature to discriminate in favour of land and make the factor for calculation something less than the actual annual benefit. But this would, I think, require to be clearly and expressly provided in order to warrant any discrimination. The construction contended for by the respondent appears to me not to be consistent with the ruling provision that the measure of benefit accruing by the cesser of interest is the measure of liability.

The ambulatory amount of annual rates and the still more ambulatory amount of annual expenditure upon repairs does not appear to me to create serious difficulty. A certain amount of confusion has, I think, been caused by treating the proportional method as if it were a statutory rule and not merely a method of convenience. For the reasons I have stated I think income means beneficial income. Accordingly, what has to be ascertained is the capital value of a beneficial income from land. In my view that is just the capital value of the land from which this benefit could be derived, and in ascertaining the capital value of land the burdens both of rates and of repairs must be taken into account however the valuation is made.

The Court recalled the interlocutor of the Lord Ordinary, sustained the fifth plea-in-law for the pursuer, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer—The Lord Advocate (Hon. W. Watson, K.C.)—Skelton. Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Defender — Robertson, K.C.—Keith. Agents—Lindsay, Howe, & Company, W.S.

Friday, January 18, 1924.

SECOND DIVISION.

[Lord Morison, Ordinary.

BALLINGALL & SON, LIMITED *v.* DUNDEE ICE AND COLD STORAGE COMPANY, LIMITED.

Contract — Construction — Deposit—Conditions — Liability of Warehouseman at Common Law — Clause in Contract Exempting from Common Law Liability for Negligence — Whether Clause Valid or Ambiguous and Self-contradictory.

A cold storage company received on deposit a quantity of hops from a brewery company, for the storage of which they were entitled to make a charge. The receipt granted by the company, which formed part of the contract of storage, contained the following stipulation :—". . . The company will use every endeavour in taking care of all goods consigned to its charge, but will not be held responsible for any damage whatsoever. If desired, the company will insure against fire, but prefer customers to insure their own goods. All goods are received subject to the conditions on the back of this receipt. *Conditions* — 1. The Dundee Ice and Cold Storage Company, Limited, will use every endeavour in taking care of all goods consigned to its charge, but will not be held responsible for loss or damage to goods stored through maintaining too high or too low a temperature in the stores, failure of machinery, buildings or plant, fire, or any other cause whatsoever other than theft. . . ."

In an action of damages against the storage company for injury to the hops while in the defenders' store owing to their (the defenders') alleged negligence, *held* (*aff.* judgment of the Lord Ordinary, *diss.* the Lord Justice-Clerk (Alness)) that the terms of the receipt exempted the storage company from their liability at common law for the damage done to the hops, and action *dismissed* as irrelevant.

Opinion per the Lord Justice-Clerk that the terms of the receipt were too contradictory to exempt the storage company from their common law liability.

Ballingall & Son, Limited, brewers, Dundee, *pursuers*, brought an action of damages for payment of £1112, 12s. against the Dundee Ice and Cold Storage Company, Limited, *defenders*.

The parties averred, *inter alia*—"(Cond. 2) On 13th May 1921 the pursuers delivered to the defenders 40 pockets of 1919 Belgian hops. Between 21st and 28th May 1921 the pursuers delivered to the defenders 35 pockets of 1919 Kents 'Tolhurst' hops and 2 pockets of 1919 Kents 'Chantler' hops. The foresaid pockets of hops were so delivered to the defenders for storage in their cold stores at Dundee, and were in fact stored by them therein, and the defenders were entitled to make a charge against the pursuers in respect of such storage. All the said pockets were dry and in good order and condition when delivered to the defenders. The receipt and conditions founded on by the defenders in answer are referred to for their terms. *Esto* that the said conditions form part of the contract the defenders were bound to use every endeavour to take care of the hops delivered to them. *Quoad ultra* the defenders' explanations in answer are denied. (*Ans.* 2) Admitted that on the dates specified the said quantities of hops were delivered to the defenders for storage, and were in fact stored by them, and that they were entitled to make a charge against the pursuers in respect of such storage. *Quoad ultra* not known and not admitted. Explained that the hops in question were 1919 hops and they were not put into the defenders' store until May 1921. Explained further that hops have been received for at least ten years by the defenders from the pursuers for storing on the conditions specified in the copy receipt herewith produced. The said conditions were a material part of the contract between the pursuers and defenders and were well known to the pursuers, who received a receipt on each occasion on which they stored hops