the Town Court of Halmstad, a court of competent jurisdiction. The application is made under the first section of the Foreign Tribunals Act 1856, which provides that where the testimony of witnesses is required in relation to civil and commercial matters pending before foreign tribunals, and an application is made to a court having authority under the Act, it shall be lawful for such court "to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses," and then follow appropriate provisions for securing the attendance of such witnesses. Now, the criterion for determining whether the application is in relation to a civil or commercial matter is provided in section 2, which enacts that the certificate of the ambassador, minister, or other diplomatic agent of the foreign power to this effect shall be evidence of the matter so certified. We have that evidence here, for we have a certificate from Baron de Bildt, who, as your Lordships are judicially aware, is the Minister of the King of Sweden, requesting the Court to grant this application, and testifying that the evidence is required in a civil or commercial matter pending in a tribunal having competent jurisdiction.

So far, then, this application is competent and in order, and I am sure that I am expressing the feelings of your Lordships when I say that we should always be anxious, in accordance with the comity of nations, to do all in our power to facilitate the granting of an application presented by the Minister of a friendly Power. But there is a small point of practice raised here by the fact that the prayer of the petition asks that the examination should take place before the Sheriff-Substitute at Dundee, and we are informed that this is done because the foreign court has specially desired it. I have here a translation of the application by the foreign court, and an examination of that document makes it plain that the foreign court has made this particular request under a misapprehension. They seem to have thought that they were entitled to apply to this Court, or to any inferior court, to examine these witnesses before them as a court. Now, that is, of course, a misapprehension, because this examination has to be conducted in accordance with the provisions of the Foreign Tribunals Act, and that Act does not provide for any such procedure. So we are not doing any injury, or even discourtesy to the foreign court by not carrying out that part of their application which requests that this inquiry should proceed before a particular individual. We must treat the application as a good application, and the only question we have to consider is to whom this inquiry is to be remitted. I do not treat the request that it should be sent to the Sheriff-Substitute as part of the prayer, but merely as a suggestion. I do not think it is a suggestion that we can follow, for, in my view, it is not in accordance with the provisions of the Foreign Tribunals Act. It would have been easy for that Act to say, had such been the intention, that these inquiries should take place before this Court or before the Lord Ordinary of the Bounds, but it does not do so. It seems to me, then, that such an inquiry is just like an ordinary commission, and, as some questions of evidence may arise in the course of this examination, I think it would be proper to remit it in the usual way to a member of the Bar.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Order the examination on oath of the witnesses named in the petition before R. A. Lee, Esq., Advocate, and for that purpose command the attendance of the said witnesses in Dundee, at such place there and at such time or times and at such hour or hours as the said R. A. Lee may fix upon, giving the said witnesses forty-eight hours' previous notice of the day and hour fixed for said examination: Grant commission to the said R. A. Lee for said examination, and grant authority to messengers-at-arms to cite the said witnesses to appear at the place or places and date or dates and hours fixed by the commissioner, to be examined on the questions contained in the Letter of Request by the Town Court of Halmstad in the kingdom of Sweden, and translation thereof, and also to bring with them, exhibit, and produce before the said commissioner upon oath all such writings and documents as they may have in their hands, custody, or keeping which they may be required so to exhibit and produce in evidence of any of the matters at issue and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are or may be: Further, dispense with the adjustment of interrogatories, and decern."

Counsel for the Petitioner—MacRobert. Agents—Hope, Todd, & Kirk, W.S.

Thursday, July 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* MAGISTRATES OF EDINBURGH.

(*Ante*, October 15, 1903, 41 S.L.R. 1, 6 F. 1.)

Revenue—Income-Tax—Deduction of Income-Tax—Liability for Income-Tax not Deducted—Customs and Inland Revenue Act 1888 (51 *and* 52 *Vict. c.* 8), *sec.* 24 (3).

The Customs and Inland Revenue Act 1888 (51 and 52 Vict. c. 8), sec. 24 (3), enacts—"Upon payment of any interest of money or annuities charged with

income-tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income-tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . and such amount shall be a debt from such persons to Her Majesty, and recoverable as such accordingly. . . ."

Held that a municipal corporation which was bound, under sec. 24 of the Customs and Inland Revenue Act 1888, to deduct income-tax at the time of paying to the lenders the interest on their loans and to account to the Inland Revenue therefor, was liable for such income-tax as it had failed to deduct.

On 9th January 1903 the Lord Advocate on behalf of the Commissioners of Inland Revenue brought an action against the Lord Provost, Magistrates, and Council of the city of Edinburgh for declarator that the defenders should be ordained "to render to the Commissioners of Inland Revenue a full account of the sums retainable by the defenders in respect of income-tax during the period from 22nd September 1901 to 5th April 1902 upon their payment of interest of moneys borrowed by them on temporary loan by means of bill or promissory-note or simple acknowledgment." The action also concluded that the defenders, whether such account were rendered or not, should be decerned "to pay to the pursuer the sum of £1200, or such other sum, more or less, as may be found to be due and payable in respect of income-tax retainable as aforesaid, with interest on the said sum of £1200. . . ."

On 7th July 1903 the pursuer obtained a decree under the first conclusion of the summons, the case *quoad ultra* being continued, and to this interlocutor of the Lord Ordinary the First Division adhered on October 15, 1903. Income-tax had not been deducted by the city authorities when the interest in question was paid; they therefore furnished the Commissioners of Inland Revenue with particulars of their payments of interest under this head. Inquiry into these payments brought out the fact that certain of the payees had paid income-tax and others were exempt therefrom, and that, as a final result, a sum of £12, 19s. which had been retainable by the defenders but which had not been deducted, alone was unaccounted for.

By interlocutor pronounced on 18th May 1905 the Lord Ordinary (STORMONTH DARLING) gave decree in favour of the pursuer for this sum of £12, 19s.

Opinion.—"The only remaining point in this case arises on the rendering of an account by the defenders for the period mentioned in the interlocutor of 7th July 1903, which was affirmed by the First Division. On adjustment of that account the matter came before my colleague, who was acting temporarily as Lord Ordinary in Exchequer, and I find in the report of what took place that the effective motion that was made by the defenders was that they should be allowed a proof of something or other, I do not exactly know what; but that did not meet with the approval of Lord Kyllachy, and accordingly parties were asked by his Lordship to endeavour to settle the matter and arrange figures for themselves. An attempt has now been made to do so by the Inland Revenue authorities, and I have before me a statement founded on particulars given by the defenders, and adopting these particulars, but bringing out the actual balance of income-tax which is said to be due as the result. It is a very small matter—it amounts only to £12, 19s.—and for that Crown counsel move me to grant decree. The only answer is, not that the sum is incorrect, but that there is no liability on the part of the defenders to account for any tax not deducted.

"Now, plainly that is a matter that ought to have been stated as a defence *in limine*. The action is one for an account, it is true, but it is also a petitory action for a large sum of income-tax due by the defenders, and due by them because the Crown regards them as having incurred liability through their failure to deduct income-tax from the persons to whom they were paying interest on these receipt notes. I do not intend to decide the point whether the statutes make a person so acting liable to pay the income-tax at all. If that point is stateable, it ought to have been stated long ago, because it would have rendered unnecessary all the elaborate inquiries which apparently have taken place and which have resulted in bringing out this balance of £12, 19s. Accordingly, I give decree for £12, 19s., and there ends the case so far as the Outer House is concerned."

The defenders reclaimed, and argued—The Court had held that there was a duty on the defenders to retain income-tax upon payment by them of interest and to account for income-tax so retained, but the statute which their Lordships so interpreted fixed no penalty for a failure in this duty. The question was therefore one of common law, and by common law a failure in such a duty could only give ground for a claim against the party in fault for such damages as reasonably flowed from his failure. Damages, however, must be relevantly averred, and in the present case there was nothing in the pleadings to show that the Inland Revenue had suffered loss, nor had they, inasmuch as it was open to them to recover the sums in question from the lenders to whom the interest was paid. It might have been averred that the defenders' failure to give an accounting timeously had prevented the recovery of the sums sued for, or that trouble had been caused by such failure which was estimated at the sum sued for. Such pleadings would have been relevant, but did not exist on record. The action was therefore irrelevant and should be dismissed.

Counsel for the pursuer and respondent was not called upon.

LORD PRESIDENT—I consider this a very preposterous contention. It really comes to this, that the Corporation of Edinburgh, by not having done what the statute clearly tells them to do, viz., deduct the income-tax payable in respect of interest, have escaped a debt which otherwise would have been due by them to the Crown. It turns upon a section of the Customs and Inland Revenue Act 1888, which imposes a duty to deduct income-tax and to keep an account, and then says that such amount, so deducted, shall be a debt to Her Majesty and recoverable as such. It seems to me that the whole matter must be taken together. The debt is the sum the retention of which is put as a duty along with the liability to render an account. But the idea that by not doing it they can get rid of a debt is a thing which seems to me, as I say, preposterous. I consider that to give any countenance to this attempt to escape a duty clearly imposed would be to throw confusion upon the administration of the Revenue law without the slightest reason for the Corporation or anyone else being allowed such a concession.

LORD M'LAREN—I think this is a case to which the maxim applies—*quod fieri debet infectum valet.* The duty is laid upon the Corporation to collect income-tax by way of deduction from the interest payable on borrowed money, to render an account of the amount of income-tax so deducted, and to pay it over to the Crown. That is a duty which consists of two parts—the collection and the paying to the Crown. It is clear to my mind that the account must be a complete account. It is no defence to an action of accounting to say that the debtor had in fact neglected part of the duty cast upon him. In such a case the debtor must pay as on a complete account, but would probably have a claim against the creditor to whom he had paid the interest without making the deduction.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

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

Counsel for the Defenders and Reclaimers—Cooper, K.C.—Spens. Agent—Thomas Hunter, W.S.

Thursday, July 6.

SECOND DIVISION.

LAWRIE'S TRUSTEES *v.* LAWRIE.

Succession — Vesting — Postponement of Vesting by Express Declaration — Conditional Institution of Issue — Declaration that Vesting to be on Youngest Child Attaining the Age of Twenty-five—Claim for Immediate Payment by the only Still Surviving Child before Attaining Age Specified.

A testator directed his trustees to hold and pay the residue of his estate to and for behoof of his children equally among them, "payable to them on the youngest attaining the age of twenty-five years," the lawful issue of any child dying before the period of division being entitled to their parent's share, and the share of any child dying before that period without leaving lawful issue to be divided among the survivors or survivor jointly with the lawful issue of predecessors. "Declaring that the period of vesting of my said children's provisions under these presents shall be as at the date when my youngest child shall attain the age of twenty-five years." The testator was survived by two children, one of whom died before the period of payment without leaving issue. The survivor, aged twenty three years, claimed immediate payment, as sole fiar of the trust estate with a vested interest therein. *Held* that the sole survivor was not entitled to immediate payment, vesting being effectually postponed by the testator's express declaration—*Maitland's Trustees* v. *M'Dermaid and Others*, March 15, 1861, 23 D. 732, *distinguished.*

John William Lawrie, grocer and wine merchant, Hanover Street, Edinburgh, died on 10th June 1891, leaving a trust disposition and settlement whereby he provided for the payment of sundry annuities, and directed his trustees with regard to the residue of his estate as follows—"That my said trustees shall hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate, and the interest and other annual produce thereof, including the principal sum or sums which may be set apart to meet the annuities hereinbefore provided, when and as the same or any part thereof may be set free by the death or second marriage of my said wife, or by the death of the other annuitants before named, to and for behoof of my children equally among them, payable to them on the youngest attaining the age of twenty-five years complete, and in the event of any of my children dying before the said period of division leaving lawful issue, such issue shall be entitled equally among them to the share to which their parent would have been entitled if in life, and in the event of any of my children dying before the said period of division without leaving lawful issue, the share of