man injured while executing the order will not, notwithstanding that he has pointed out the danger to his employer or his superior in the service, be within the protection of the statute; but it is manifestly impossible, unless the provision contained in subsection (3) of section 2 is treated as meaningless, to affirm that in all circumstances working in the face of a known danger bars action at the injured workman's instance. The question is always, as it seems to me, one of circumstances, and that being so, the present case cannot in my opinion be disposed of without a proof."

The pursuer appealed for jury trial.

The defender argued—The Sheriff-Substitute was right to refuse proof on the ground of irrelevancy. Taking the averments of the pursuer as true, it showed that he was working in the face of a known danger, and upon the authorities he could not recover under these circumstances—*M'Ternan* v. *White & Bee*, January 25, 1890, 17 R. 368; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955; *Fraser* v. *Hood*, December 16, 1887, 15 R. 178.

Counsel for pursuer was not called on.

The Court approved of this issue for the trial of the cause—"Whether on or about the 10th day of September 1890, and at or near an old stone wall at Bridge of Weir, the pursuer, while in the employment of the defender, was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer. Damages claimed, £241, 16s. sterling."

Counsel for the Appellant—Orr. Agents—Hutton & Jack, Solicitors.

Counsel for the Respondent—Wallace. Agent—John Rhind, S.S.C.

Thursday, February 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

RIDDELL AND OTHERS (MRS BARR'S TRUSTEES) *v.* RIDDELL AND OTHERS (REV. WM. BARR'S TRUSTEES).

Trust—Settlement—Liferent.

A testator directed his trustees to pay to his wife the sum of £2100, with power to her to dispose of the same in such manner as she should think fit, and "to pay to her the additional sum of £2000, to be held by her during her liferent, and the uncontrolled possession and profit of which she shall enjoy as long as she lives, which sum, however, should nothing occur to render it necessary for her to touch upon or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall at her death return and form part of my trust-estate." In a holograph supplementary settlement the testator narrated the provisions made for his wife in the settlement thus—"I instruct my executors . . . to pay to her these two sums on the conditions stated—1st, the sum of two thousand and one hund. pounds sterling (£2100) in fee, to be alike in use and destination at her sole and absolute disposal; and 2nd, the sum also of two thousand pounds (£2000), the free and unfettered use of which she shall enjoy so long as she lives, with power even to trench upon the principal should she ever under any emergency require to do so; declaring, however, that the said £2000 so far as not required for my wife's personal use shall at her death return . . . to my estate." In the next year he practically repeated this direction. The testator was survived by his wife, who preserved the sum of £2000 intact during her life, and left a trust-disposition and settlement which, *inter alia*, specially dealt with said sum.

Held that though the widow might have trenched on the sum of £2000 during her life, she had no power to test upon it, and that at her death it fell into the residue of her husband's estate.

The late Rev. William Barr died on 7th June 1883, survived by a widow, but by no issue, and leaving a trust-disposition and settlement, to which his wife was a consenting party, dated 10th February 1881. By this settlement he directed the trustees named therein (1) to pay his debts, (2) to convey his household effects to his wife for her liferent use allenarly; and "in the third place, at the first term of Whitsunday or Martinmas that shall first arrive after my death, to pay and make over to the said Mrs Barbara Riddell or Barr the sum of two thousand one hundred pounds, with power to her, by herself alone, to dispose of the same during her life, or in such way and manner as she shall think fit; in the fourth place, to pay to her at the said first term of Whitsunday or Martinmas that shall first arrive after my death the additional sum of two thousand pounds, to be held by her during her lifetime, and the uncontrolled possession and profit of which she shall enjoy as long as she lives; which sum, however, should nothing occur to render it necessary for her to touch upon, or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall at her death return and form part of my trust-estate;" and lastly, to pay the residue in the manner pointed out by any writings under his hand, and in default thereof to his nearest personal representatives.

In a holograph supplementary settlement dated 26th January 1882 he recited the third head of his trust-disposition as follows—"In that will . . . My debts thus paid, I instruct my said executors next not only to hand over to my wife for her liferent use all my household furniture, &c., as specified in my previous will, but also to pay to her these two sums on the conditions stated—1st, the sum of two thousand and one hund.

pounds sterling (£2100) in fee, to be alike in use and destination at her sole and absolute disposal; and 2nd, the sum also of two thousand pounds (£2000), the free and unfettered use of which she shall enjoy so long as she lives, with power even to trench upon the principal should she ever under any emergency require to do so; declaring, however, that the said £2000 so far as not required for my wife's personal use shall at her death return, and, if thought necessary, be ordered by her then to return to my estate and be disposed of as I shall appoint." He then made certain provisions to relatives named, and directed his executors to divide equally among his nieces and nephews the residue of his estate, which he thus calculated—"1. What may possibly remain in the hands of my executors after meeting the specified provisions of both my wills, say £2000. 2. What is likely to return to my estate after the death of my wife £2000. And 3. What returns to my estate at the death of our servant Janet, £350, in all £4350."

After Mr Barr's death his executors entered upon the administration of his estate, and in the course of administration in May 1884 they paid to the widow the sums of £2100 and £2000 directed to be paid to her under the third and fourth purposes of the trust-settlement respectively. The sum of £2000 was separately invested by Mrs Barr, she never entrenched or used any part of the capital of it, and it remained a separate part of the estate down to her death.

Mrs Barr died on 24th October 1889, leaving a trust-disposition and settlement dated 5th January 1889, whereby she conveyed to trustees named therein "the whole means and estate, heritable and moveable, real and personal, owing and belonging to me, or which shall be owing and belonging to me, or over which I may have the power of disposal at my death; declaring that the above clause is intended to include and shall include a sum of £2000 left to me by my said husband under his trust disposition and settlement, and which sum my said husband intended I should dispose of as I thought right and proper."

The present action was raised by the executors under Mr Barr's trust-disposition and settlement against the trustees under Mrs Barr's trust-disposition and settlement for payment of the said sum of £2000.

The pursuers pleaded—"(1) The said Mrs Barr not having trenched upon or disposed of said sum of £2000, the same falls to be repaid to the estate of the said Rev. William Barr, as provided by his settlement, and decree should accordingly be pronounced as concluded for. (2) The settlement of the said Mrs Barr not being a valid exercise by her of the power of trenching upon or disposing of said £2000, the pursuers are entitled to decree."

The defenders pleaded—"(1) On a sound construction of the Rev. William Barr's settlement, Mrs Barr, on his death, took an absolute right to the £2000 in question; or otherwise had a testamentary power of disposal thereof."

Upon 3rd December 1890 the Lord Ordinary (KYLLACHY) decerned against the defenders in terms of the conclusions of the summons.

"*Opinion.*—In this case I have come to the conclusion that the pursuers, the Rev. William Barr's trustees, are entitled to decree in terms of their summons.

"The first question is as to the true construction of Mr Barr's settlement with respect to the bequest of £2000, which is the subject of the action. In my opinion that settlement must be held to include both the original trust-disposition and settlement and the holograph supplementary settlement; and reading these documents together, I am unable to come to any other conclusion than that maintained by the pursuers, viz., that Mrs Barr's right was in effect a liferent, with a limited power of disposal during her life. I do not doubt that she might have spent the money, and it may be that she might have disposed of it gratuitously *inter vivos*. But I do not think it possible to hold that she had the power to test upon it, and therefore assuming—as I do assume—that she was entitled to have the money paid over to her, and to use it, or any part of it, for any purpose she pleased during her life, I consider that she was under an obligation to repay at her death to her husband's estate so much of it as she did not so use. . . .

"The following authorities were referred to—For pursuers—*Sprott*, 17 D. 840; *Lawson*, 3 D. 1001; *Smith*, 10 R. 1144; *Tronson*, 12 R. 155. For defenders—*Buchanan*, 6 Macph. 536; Ersk. iii. 8, 45; *Mackay*, 13 S. 246; *Dwyer*, 1 R. 943."

The defenders reclaimed, and argued—The two deeds must be read together, and the statements in them showed that Mr Barr had left this sum of £2000 to his wife for her own use. It was true that he qualified that by saying that it was for her enjoyment during life, and was to return to his estate, so far as not trenched upon, after her death; but she was also given power "to dispose of it otherwise." That power she had used in her settlement, and it ought to receive effect—*Reddie's Trustees* v. *Lindsay*, March 7, 1890, 17 R. 558.

Counsel for respondents were not called on.

At advising—

LORD YOUNG—I do not think it is necessary for us to hear any further argument. I agree—and that without any doubt—with the opinion expressed by the Lord Ordinary. I think it is plain that the result at which he has arrived is the right one, not only under the provisions contained in the trust disposition and settlement of the late Mr Barr dated 10th February 1881, but also under the provisions of his holograph supplementary testament dated 12th January 1882. Taking these two documents together, then the question is, whether this sum of £2000 passes under the will of the deceased Mrs Barr as being at her own disposal at her death, or whether the trustees of her late husband are not entitled to recover it as part of the residue of his estate?

In my opinion the Lord Ordinary has

taken the correct view. I think that this lady had only a liferent in this sum, and although under the provisions of both deeds she might be entitled to use the capital of it during her life in case of urgent necessity, I think she had no power to dispose of it by will. The difference in the expressions used regarding this sum of £2000 and the other sum of £2100 in both deeds makes this quite clear.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimers—Lorimer—Craigie. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Respondents—T. Shaw—W. Campbell. Agents — Carmichael & Miller, W.S.

Friday, February 20.

FIRST DIVISION.

[Exchequer Cause.

RUSSELL (SURVEYOR OF TAXES) *v.* NORTH OF SCOTLAND BANK.

Revenue — Income-Tax — Application for Certificate of Over-Payment—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 133—*Appeal—Competency.*

Held that where the General Commissioners granted a certificate of overpayment under section 133 of the Income Tax Act 1842, holding that the application for such certificate had been made timeously under the Act, it was competent to appeal against their decision.

Revenue — Income-Tax — Application for Certificate of Over-Payment — Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 133.

By section 133 of the Income-Tax Act 1842 it is enacted, "That if within or at the end of the year current at the time of making any assessment under this Act," any person charged under Schedule D should find, and should prove to the Commissioners, that his profits during the year had fallen short of the computed sum upon which he had been assessed, it should be lawful for the Commissioners to cause the assessment to be amended, and if the sum assessed should have been paid, to grant a certificate of over-payment.

A bank discovered in October 1888 that it had been assessed on too large a sum for the year 1888-9, but failed to apply for a certificate of over-payment till July 1890. *Held* that the application for a certificate must be made within the year current, or within as short a time after the end of that year as was possible by the exercise of due diligence, and that the bank's application must be refused, not having been made with due diligence.

George Anderson, manager for and on behalf of the North of Scotland Bank, Limited, Aberdeen, appealed under section 133 of 5 and 6 Vict. cap. 35, as amended by section 6 of 28 Vict. cap. 30, against an assessment of £35,840, 7s., made upon the company on its own return under Schedule D of the Income-Tax Acts for the year 1888-9, and craved to have it restricted to £27,036, 8s. 7d., and inasmuch as the tax on the assessment had been paid, craved to have a certificate of over-assessment, and to be repaid the sum of £220, 1s. 11d., tax at 6d. per pound on £8803, 8s. 5d., for the year 1888-9.

The Commissioners having fully considered the case, were of opinion (1) that the words "within or at the end of the current year" did not imply a limitation but an extension of time; (2) that even assuming the view of the case of *The Cape Copper Company*, presented by the Assessor, the claim in the present instance had been intimated within a reasonable time. They accordingly sustained the appeal, and on the application of the appellant granted a certificate of over-payment.

The Surveyor being dissatisfied with this decision, the present case was stated at his request under the Taxes Management Act 1880, for the opinion of the Court of Exchequer upon the following questions:—"(1) Whether the Commissioners' decision is subject to appeal or review? and (2) if it be so, whether according to the facts stated, the Commissioners had powers to grant a certificate of over-payment for the year 1888-89?"

The facts as stated in the case were these:—(1) The company was assessed under Schedule D on its own return on the full amount of its untaxed profits on the average of the three years 1885, 1886, and 1887, as shown by its balance-sheets made up to 30th September in each of these years. (2) The proved amount of the untaxed profits for the year of assessment, estimated in conformity with section 6 of 28 Vict. cap. 30, on the average of the three years, including the year of assessment, fell short of the amount assessed by the sum of £8803, 18s. 5d., and it is the tax on this sum at the rate of 6d. per pound (£220, 1s. 11d.) which is the amount of which repayment is sought for 1888-89. (3) The company's balances for each of the years on which the foregoing average is founded were certified by the company's auditors as under:—1886, on 15th October 1886; 1887, on 17th October 1887; and 1888, on 12th October 1888. (4) The meetings of the shareholders at which these balances and directors' reports were approved, were held as under:—1886, on 5th November 1886; 1887, on 4th November 1887; and 1888, on 2nd November 1888. (5) At the time the company made the return for the year 1888-89 the profits of the year of assessment were not and could not be known, the company's financial year ending on 30th September in each year. (6) No intimation of any appeal was made until 10th July 1890. In support of the appeal,