posed change amounts to the constitution of a new and additional business, or (as the respondents contend) involves merely the extension and development of an existing branch of the business of retail watchmakers and jewellers. If the latter view were established by the proof, the complainer's counsel admitted that the matter would fall within the arbitration clause, but if the former view were proved to be correct, then he maintained that it would be for the Court to grant interdict as craved. This is, in my judgment, an unsound and a too finical reading of article *Fifteenth* of the contract. I think that whichever of the alternative views of the matter may turn out to be the true one, a question of construction of the contract, and particularly of article *Seventh* thereof, above quoted, is involved, and that the matter of construction is referred to the arbiter by article *Fifteenth*. Indeed, the complainer's own averment at the end of statement 3 is that 'this addition to the retail watchmaking and jewellery business of an optician and sight-testing business constitutes a change in the nature of the said partnership business for which the said contract of copartnership does not provide.' This, in my judgment, amounts to a frank confession that the question turns upon a construction of the contract. Similarly, the respondents' counter averments appear to me to raise sharply questions as to the meaning of the contract, and especially of article *Eighth* thereof. In my opinion, then, the record discloses the existence of a dispute between the partners relating to the contract of copartnery, which must be decided by the arbiter, and upon the merits of which therefore I refrain from expressing any opinion.

"While, however, I agree so far with the respondents' contention, I am not prepared to sustain their third plea-in-law to its full extent. That plea is that 'the present proceedings are excluded by the clause of reference quoted.' I think that the proper course is not to refuse the note *de plano*, but to sist proceedings *in hoc statu*, in respect that the dispute between the parties falls, in my judgment, within the terms of article *Fifteenth* of the contract of copartnery."

The complainer reclaimed, and argued—(1) The present proceedings were not excluded by the clause of arbitration, which only ousted the jurisdiction of the Court in "disputes relating hereto," *i.e.*, to the deed of copartnery. There was here no dispute as to the contract of copartnery, which dealt only with the watchmaking business, but a dispute upon a question of fact outwith the contract altogether, viz., whether the new business was or was not a watchmaking business. That was a question of fact to be decided by the Court after proof—*Roddan* v. *M'Cowan*, June 26, 1890, 17 R. 1056, 27 S.L.R. 984; *Ransohoff & Wissler* v. *Burrell*, December 10, 1897, 25 R. 284, 35 S.L.R. 229. (2) In any event the complainer was, under article 7, invested with a complete power of veto.

Argued for the respondents—(1) The parties were not at issue upon any question of fact. There was no dispute as to what the new proposals were, but merely as to whether they fell or did not fall within the scope of the contract, and that such was a dispute "relating to" the contract, and therefore one for the arbiter. (2) The question as to the complainer's right of veto was purely one of the construction of the contract, and therefore for the arbiter.

LORD KYLLACHY — The first question which we have to decide is whether the complainer is entitled to have a proof as to the exact nature of this proposed new business, such proof being said to be necessary as a preliminary towards determining the question whether the dispute between the parties falls under the clause of reference in the contract.

If the parties had been at all at issue upon the facts, such proof would be proper and necessary. But it is, I think, quite plain that with respect to the nature and extent of the proposed new departure there is no dispute. The sole question is whether upon the admitted facts the kind of business proposed to be added to the concern falls within the business of watchmakers and jewellers in the sense of the contract of copartnery. And that being so, it seems to me that it is a question as to the construction of the contract and nothing else.

The other point, viz., as to whether the complainer is under the 7th article entitled to exercise a veto upon what is proposed, is also clearly a question upon the construction of the contract. It is a point not perhaps free from difficulty, but it is one entirely for the arbiter.

LORD JUSTICE-CLERK—I agree with the judgment of the Lord Ordinary, and with the reasons which he has stated.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Reclaimer — Graham Stewart — Morton. Agent — W. A. Farquharson, S.S.C.

Counsel for the Respondents — Cullen, K.C. — Macmillan. Agents — Cowan & Stewart, W.S.

Thursday, January 11.

SECOND DIVISION.

[Lord Dundas, Ordinary.

WALKER'S TRUSTEES *v.* AMEY AND OTHERS.

Trust—Inter vivos Disposition—Right to Revoke.

A lady in a trust-disposition (on the narrative that owing to delicate health, and in order to make provision for herself in the event of continued illness or incapacity) declared that she instantly made over to A and B, as

trustees, £700 sterling. The purposes were (first) payment of annual income to the truster during life; (second) power to the trustees in their discretion at any time to apply the whole or part of the capital for the truster's behoof; (third) on her death the realisation of investments and payment of proceeds, subject to two legacies to C and D, in equal shares to the truster's mother, brother, and two sisters, with destinations-over in the event of the brother or either sister predeceasing the truster. The deed contained powers of investment and sale, and a declaration that it was irrevocable. The sum of £700 was handed over to the trustees, and the deed registered.

The lady, of the same date, executed a testament in which she appointed A and B her sole executors, and bequeathed the whole personal estate belonging to her at her death to her mother, brother, and two sisters in equal shares, with a destination-over similar to that in the trust-disposition. The testatrix reserved her liferent, with power to revoke or alter, and she revoked all previous settlements made by her. By two codicils she left two legacies to C.

The lady died, survived by her husband, who claimed *jus relicti* out of the £700, maintaining that the trust-disposition was merely administrative and testamentary, and therefore revocable.

Held that it was irrevocable.

Mrs Margaret Amey or Walker, on the 18th day of December 1903, executed a trust-disposition in the following terms:—"I, Mrs Margaret Amey or Walker, presently residing in Hawick, carrying on business there as a tobacconist, and wife of David Walker, millwright, sometime residing in Leith, considering that, owing to the delicate state of my health at present, and in order to make provision for myself in the event of continued illness or incapacity, I have resolved to make the following disposition of the principal sum after mentioned, for my own benefit in the first place, and for those persons hereinafter named after my death in the second place: Therefore I declare that I have instantly given and made over, as I do hereby give and make over, to John Oliver, solicitor, residing at Lynnwood, Hawick, and John Smith, residing at No. 2 Wellogate Place, Hawick, and to the survivor of them, and to such other person or persons as they or the survivor of them shall assume to act in the trust hereby created, and to the survivors and survivor of the persons hereby named or assumed as aforesaid, as trustees, for the purposes after mentioned (the said trustees named and assumed as aforesaid being throughout these presents denominated 'my trustees'), and to the assignees of my trustees, the principal sum of seven hundred pounds sterling, being money earned by me in the business in which I am engaged: But declaring always that these presents are granted by me in trust only for the purposes following, *videlicet*—(*First*) That my trustees shall, with all convenient speed, invest the said sum in accordance with the powers hereinafter conferred upon them, and shall pay the annual interest and income arising therefrom to myself during all the days of my life, at such times and terms as to them shall seem convenient and proper; (*Second*) That my trustees shall have power at any time during my lifetime, if they, in their own absolute discretion, shall deem it advisable for my benefit, being in no way bound, to apply any part of the said principal sum, or the whole thereof if necessary, for my maintenance and behoof; and (*Third*) That my trustees shall, as soon after my death as possible, realise and convert into money the stocks, shares, or securities upon which the said principal sum, or such part thereof, if any, as shall then be extant, and shall from the proceeds thereof pay to Mary Amey Laing or Looz, residing at 21 Dean Street, Edinburgh, my niece, the sum of twenty-five pounds sterling, and to Violet Looz, step-daughter of my said niece, the sum of twenty-five pounds sterling, and shall divide and pay the remainder of said proceeds, if any, after deducting expenses of realisation and division and all other necessary outgoings, amongst and to the following persons in equal shares, *videlicet*, to Margaret Reid or Amey, my mother, if she shall survive me, one share; to John Amey, residing in Edinburgh, my brother, one share; to Mary Amey or Laing, wife of William Laing, residing in Glasgow, my sister, one share; and to Isabella Amey or Murdoch, my sister, in Australia, one share; declaring always, that in the event of my said brother or either of my said sisters predeceasing me, the share of the predeceaser shall be paid to his or her lawful issue then in life in equal shares, and failing such issue, then and in that case the same shall accresce and belong to the survivors or survivor of my said brother and sisters, or their respective issue, equally, *per stirpes;* and I hereby authorise and empower my trustees to sell the trust-estate or any part thereof at any time they shall think fit; and also to appoint factors and law agents, from their own number or otherwise, and to allow them suitable remuneration; and I empower my trustees to invest the trust-funds in . . . And I further hereby declare that these presents shall not be revocable by me upon any ground whatever . . ." The trust-disposition was handed over to the trustees and registered by them on the 23rd of December 1903, and the trustees were immediately put into possession of the funds, which were administered by them until the truster's death.

Upon the same date—viz., 18th December 1903—she executed the following testament:—"I, Mrs Margaret Amey or Walker, . . . being desirous of settling my affairs in the event of my death, do hereby nominate and appoint John Oliver, solicitor, residing at Lynnwood, Hawick, and John Smith, residing at No. 2 Wellogate Place, Hawick, or the survivor of them, to be my

sole executors or executor: And I hereby leave and bequeath the whole personal estate of every description which shall belong to me at the time of my death, after deducting therefrom my sickbed and funeral expenses, and all my just and lawful debts and the expenses of realising my said estate, to the following persons, in equal shares, *videlicet*, Margaret Reid or Amey, my mother, John Amey, residing in Edinburgh, my brother, Mary Amey or Laing, wife of William Laing, residing in Glasgow, my sister, and Isabella Amey or Murdoch, my sister in Australia; declaring always, that in the event of my said brother or either of my said sisters predeceasing me, the share of the predeceaser shall be paid to his or her lawful issue then in life in equal shares, and failing such issue, then and in that case the same shall accresce and belong to the survivors or survivor of my said brother and sisters, or their respective issue, equally, *per stirpes;* and I reserve my own liferent of the premises, with power to alter, innovate, or revoke these presents at any time as I shall think proper; and I dispense with delivery hereof; and I revoke all previous settlements made by me . . ."

By a codicil, dated 16th January 1904, a legacy of £25 was left to the said Mrs Mary Amey Laing or Looz, and by another codicil, dated 1st March 1904, another legacy of £50 to the same lady. The testament and codicils were registered on 18th March 1904.

Mrs Walker died on 12th March 1904, survived by her mother Mrs Margaret Amey, her brother John Amey, and her two sisters Mary Laing and Isabella Murdoch. She was also survived by her husband David Walker, who claimed, *jure relicti*, half of the fund held by the trustees under the trust-disposition, maintaining that the trust-disposition was revocable and testamentary, and therefore ineffectual to defeat his right.

The beneficiaries under the trust-disposition claimed among them the whole fund, maintaining that the trust-disposition was valid, operative, and irrevocable, and that accordingly the truster at the date of her death was not vested in the moneys conveyed by the trust-disposition, and that therefore they were not subject to the husband's *jus relicti*.

In these circumstances the trustees acting under the trust-disposition brought an action of multiplepoinding, in which the fund *in medio* was the fund in their hands. They concurred in the contention of the beneficiaries.

The Lord Ordinary (DUNDAS), on 17th June 1905, pronounced an interlocutor finding that the trust-disposition was a valid and operative document.

Opinion.—"In this multiplepoinding the fund *in medio* consists of certain moneys conveyed to trustees (who are nominal raisers) by the late Mrs Walker by a trust-disposition, dated 18th December 1903, so far as remaining in their hands. The principal question which I have to decide is whether or not this deed was of a revocable character. The husband of the truster maintains the affirmative of this proposition, and claims one-half of the fund *jure relicti*. The negative is maintained by the trustees, who claim to hold and administer the whole fund in terms of the trust-disposition, and by those persons who would take benefit if the deed is an irrevocable one.

"I may summarise the contents of the trust-disposition. The truster at, and for some years prior to, its execution was living apart from her husband, and carrying on business on her own account as a tobacconist in Hawick . . . . . .

[*His Lordship then narrated the narrative and the provisions of the trust-disposition, the execution of the testament and its provisions, the death of Mrs Walker survived by her mother, brother, sisters, and husband, and the claim by the husband; v. sup.*] . . . . . .

"The reported cases upon this branch of the law are very numerous. Every case must of course depend upon the precise terms of the deed under consideration, but one may derive valuable aid from the decisions and dicta in the books as to the general rules of law applicable to such cases, and as to the features in such deeds which have been held to make for or against revocability. Perhaps the most instructive aids to the just consideration of the trust-disposition here in question are the recent cases of *Shedden*, 23 R. 228, where a deed was held not to be revocable, and *Byres' Trustees*, 23 R. 332, where the contrary result was arrived at. The question must always be one of intention, whether, on the one hand, the granter intended the trust to be one merely for the administration of his affairs, he retaining the radical and beneficial interest in the estate conveyed, and being entitled to revoke the deed at pleasure, or whether, on the other hand, he must be held to have truly divested himself of the estate so as to enable the trustees to hold it against him.

"In my opinion Mrs Walker's trust-disposition falls under the second of these alternative categories. It appears to me that it contains most, if not all, of the characteristics which are held to indicate that a deed is not of a testamentary nature but is irrevocable. In particular, I may note (1) that this deed contains a *de præsenti* conveyance to trustees, not of the truster's whole estate but of a specified sum of money; (2) that it is expressly declared that it shall not be revocable upon any ground whatever; (3) that in point of fact the money was immediately handed over by the granter to the trustees, and the deed delivered to them and recorded. As indicating the strong significance of delivery following upon a declaration of irrevocability in the deed itself, I may refer especially to the opinion of Lord Kinnear in *Byres'* case (*sup. cit.*); (4) that the express power to the trustees to apply the capital, in whole or in part, for the granter's behoof, in their own absolute discretion, seems adverse to the view that she could at any time have called upon them to denude of the whole gift; (5) that the fact that abso-

lute vesting in certain of the persons to whom the trustees are directed to pay the residue of the trust fund after the truster's death, did not emerge until that date, is not hostile to the view that the deed could not be revoked—*Lyon's Trustees*, 3 Fr. 653; and (6) that the argument for revocability does not, perhaps, arise under quite such favourable circumstances, when put forward by a third party after the granter has died without having made any attempt at revocation, as when it is urged by the granter himself during his lifetime. For these reasons, I am of opinion that the contention put forward by Mr Walker is unsound and cannot be given effect to." . . . [*His Lordship then dealt with another branch of the case.*] . . .

Walker reclaimed, and argued — The trust-disposition was merely an administrative and testamentary deed, the truster retaining the radical interest in the estate and being entitled to revoke at pleasure. That such was the truster's intention was apparent not only from the preamble but from the general tenor of the deed, especially when read along with the testament. The declaration of irrevocability was in itself of little moment—*Smitton* v. *Tod*, December 12, 1839, 2 D. 225; *Murison* v. *Dick*, February 10, 1854, 16 D. 529; *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, 9 S.L.R. 106; *Menzies* v. *Murray*, March 5, 1875, 2 R. 507, 12 S.L.R. 373; *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, 15 S.L.R. 690; *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746, 20 S.L.R. 486; *Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236; *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267; *Lyon* v. *Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568. *Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228, 33 S.L.R. 154, was distinguishable. Such a deed should not be allowed to defeat a husband's rights. It would not have defeated legitim—Fraser, H. & W., ii. 1001; *Nicolson's Assignee* v. *Macalister's Trustees*, March 2, 1841, 3 D. 675, 16 F.C. (octavo) 728.

Argued for the respondents—The deed was irrevocable for the reasons set forth by the Lord Ordinary in the last paragraph of his opinion. *Shedden* (quoted above); *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715; *Smith* v. *Davidson*, December 21, 1900, 8 S.L.T. 354, were authoritative decisions. In *Byres' Trustees* (quoted above), the most important adverse authority, the language of the deed was obviously testamentary.

LORD JUSTICE-CLERK—In this case I see no reason for interfering with the judgment of the Lord Ordinary.

LORD KYLLACHY—I am entirely satisfied with the judgment of the Lord Ordinary.

LORD STORMONTH DARLING—I agree.

LORD LOW—I am of the same opinion. I think the main question in the case is whether the directions to the trustees to divide the fund among the persons named on the death of the truster were only testamentary, or conferred a present right on these persons subject to certain contingencies. The latter is, in my opinion, the correct view. In the first place the truster expressly declares the deed to be irrevocable, and although such a declaration is by no means conclusive, it is always an element which may be considered, and as a testamentary writing is in its nature revocable, the declaration of irrevocability shows that the truster did not regard the trust deed in question as being of that character. In the next place the deed deals with a specific sum, and further, on the same day the truster executed a *mortis causa* settlement dealing with the remainder of her property. Again, the trust deed in question was delivered to the trustees, and the fund handed over to them, and I think that from that moment they held the fund for the benefit of the persons named in the deed, and that the truster could not have defeated the interest of these persons by revoking the deed.

The Court adhered.

Counsel for the Reclaimer (Walker)—Hunter, K.C. — Hart. Agents — Fyfe, Ireland, & Dangerfield, W.S.

Counsel for the Respondents (Walker's Trustees and Others)—Macmillan. Agents —Sibbald & Mackenzie, W.S.

Counsel for the Respondent (John Amey) —Trotter. Agents — Forman & Bennet Clarke, W.S.

Friday, January 12.

SECOND DIVISION.

[Exchequer Cause.

WALKER *v.* REITH (INLAND REVENUE.)

Revenue — Partnership — Income Tax — Abatement—Employee—Partner or Employee—Profits Credited to an Employee in the Books of a Company but not his Indefeasibly—Finance Act 1898 (61 *and* 62 *Vict. cap.* 10), *sec.* 8.

A testator by his trust-disposition and settlement conveyed his whole estate to trustees. He left also, regarding his business, a deed of arrangement which formed part of his settlement as if embodied therein. Article (1) thereof named fifteen employees and allocated to each a certain number of shares, as prospective interests in the business, with a declaration that these "shall not become vested interests until the whole of my capital and interest has been paid out as after mentioned, and it shall not be competent . . . for any employee to sell, convey, or dispose of his interest in the profits or in the business itself." Article (2) provided that after certain deductions the profits of the business were to be divided among the sur-