

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. Gemmill*, 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-

viving employees in proportion to the number of their shares, ten per cent. of such profits being paid to them in cash and the remainder being credited to their respective accounts in said business, and forming a fund available for paying out the testator's capital, until his whole capital and interest was paid out. Article (3) provided that payment should not be made to the representatives of any employee dying or becoming bankrupt, of the amount standing to his credit in the books, before all the testator's capital and interest in the business had been paid out. Article (4) provided that the employees should carry on the business as carried on by the testator. The trustees were not to be required to take any active part in the business, nor to be liable for omissions or negligence, but were to have the sole right of granting authority to sign the firm name, of appointing managers and superintendents, of settling questions as to salaries and wages, and of removing employees from the business. Article (5) empowered the trustees to require payment of such of the testator's capital as they thought from time to time not necessary for the business, and directed them after the whole of the testator's capital and interest had been paid out, and after the amounts due to representatives of deceased and bankrupt employees had been paid, to convey to the surviving employees the whole business at the price of £20,000. Article (6) entitled the trustees to inspect the books from time to time, and empowered them, if losses were made, to wind up the business, paying out first the testator's capital, and dividing any remaining proceeds amongst the employees.

A, an employee, whose total income for the year ending 5th April 1905 amounted (1) if his income was taken as his salary plus his share of the ten per cent. of profits paid in cash, to £561, but (2) if his income was taken as his salary plus his share of the full amount of the profits, whether paid or credited, to £2000, claimed abatement of income-tax equal to the income-tax upon £120, on the ground that his total income for the year of assessment though exceeding £160 did not exceed £600 (61 and 62 Vict. cap. 10, sec. 8).

Held (1) that the business was the property of the trustees until the conditions were fulfilled for their conveying it to the employees, and that till then the employees were only employees with a right to share in ten per cent. of the profits, and not partners; (2) that the share of the ninety per cent. of profits credited to A in the books of the company was not part of his income for the year of assessment; and (3) that A was consequently entitled to the abatement claimed.

Mersey Docks v. Lucas, 1883, L.R. 8 App. Ca. 891; *Hudson v. Gribble*, *Bell v.*

Gribble, [1903] 1 K.B. 517; and *Smythe v. Stretton*, 1904, 20 Times L.R. 443, distinguished.

This was an appeal by case stated under The Taxes Management Act 1880, for the opinion of the Court of Exchequer. The appellant was James Walker, of Messrs R. & J. Dick, Glasgow; the respondent was James Reith, Surveyor of Taxes, Glasgow.

The Finance Act 1898 (61 and 62 Vict. cap. 10), sec. 8, provides:—"Any individual who having been assessed or charged to income-tax or having paid income-tax either by deduction or otherwise claims and proves in manner prescribed by the Income-Tax Acts that his total income from all sources, although exceeding £160, does not exceed £700, shall be entitled to relief from income-tax equal . . . (c) if his total income exceeds £500 and does not exceed £600, to the amount of the income-tax upon £120 . . . and such relief shall be given either by reduction of the assessment or by repayment of the excess which has been paid, or by both of those means, as the case may require."

At meetings of the Commissioners for the General Purposes of the Income-Tax Acts held at Glasgow on the 16th day of December 1904 and the 23rd day of March 1905—James Walker, of Messrs R. & J. Dick, 3 M'Phail Street, Glasgow, appealed against an assessment of £316 (duty £15, 16s.) made under Schedule D of the Income-Tax Acts for the year ending 5th April 1905, in respect that he had not been allowed an abatement of £120. The assessment was made under 5 and 6 Vict. c. 35, sec. 100; 16 and 17 Vict. c. 34, sec. 2; and 4 Edw. VII, c. 7, sec. 7. The abatement was claimed under 61 and 62 Vict. c. 10 sec. 8 (*cit. sup.*) on the ground that the appellant's total income from all sources did not exceed £600.

The following facts are taken from the case stated:—James Dick, manufacturer, Glasgow, died on the 7th March 1902 leaving a general trust-disposition and settlement appointing testamentary trustees and regulating the succession to his whole means and estate after his death, and also a deed of arrangement regarding the business of boot and shoe and belt manufacturer carried on by him. The deed of arrangement (*vide* its last article *infra*) was incorporated in the trust-disposition and settlement. The said deed of arrangement, which was dated 4th and recorded in the Books of Council and Session 11th March 1902, formed part of the case, and was as follows:—

"I, James Dick, manufacturer in Glasgow, considering it is desirable I should make arrangements to take effect after my decease regarding my business of boot and shoe and belt manufacturer, presently carried on by me at Greenhead, Glasgow, and elsewhere, under the designation of R. & J. Dick, and considering that the best method which has suggested itself to me of continuing the business is by giving the heads of the various departments and others in my employment a prospective interest in the profits and power to acquire

the business after my decease, I have determined and do now make the following arrangements, *videlicet* :—

“(First)—The parties hereinafter named, presently in my employment (and hereafter termed the employees), shall from and after my death have each, on the terms and conditions herein set forth, a prospective interest in the profits of the business and in the business itself if acquired by them in proportion to the number of shares hereinafter set forth against their names respectively, *videlicet* :—

John Edward Audsley, Greenhead Factory,	Ten shares.
Andrew Barclay, Greenhead Factory,	Ten shares.
Adam Hay, Greenhead Factory,	Ten shares.
Andrew McAllister, London	Ten shares.
Peter Dennistoun, Greenhead Factory,	Ten shares.
Peter Brock, Greenhead Factory,	Ten shares.
Thomas Traill,	Ten shares.
David Kennedy, Belfast,	Ten shares.
Robert Burns,	Four shares.
Walter Reid,	Four shares.
James Walker, Birmingham,	Four shares.
John Linn, London belt shop,	Two shares.
Robert Lockhart, Argyle Street shop,	Two shares.
Allan Mair, shop, 12 Gallowgate,	Two shares.
David Galbraith, shop, 18 Gallowgate,	Two shares.

Total number of shares, One hundred.

But it is understood that I shall be entitled to add to or take from the number of employees, and to allot to any new employees such number of shares as I may consider proper, or vary the said allotment in such manner as I may consider proper; and it is hereby specially provided and declared that the provisions under these presents in favour of the employees 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 on any ground or pretext whatever for any employee to sell, convey, or dispose of his interest in the profits or in the business itself under these presents to any person, and any act done in contravention of this stipulation shall be, and is hereby declared to be, *ipso facto* void and null. In the event of any of said persons ceasing to be an employee or leaving the business, the share of the profits of the business allotted to him and his interest therein shall, unless I otherwise direct, from and after the date of his so ceasing or leaving, accrete to and be divided amongst the other remaining employees in proportion to their said shares.

“(Second)—At the date of my death the books of the said business shall be brought to a balance, and my capital in the business ascertained, and interest at the rate of three per centum per annum shall be paid thereafter to my trustees in cash on the thirty-first day of December in each year after my decease, on the total amount at my credit in the books of the business, or

so much thereof as may remain unpaid, and at the annual balances, which shall take place as at the thirty-first day of December in each year after my death, the whole profits of the business, after deducting (first) the said interest on my capital account, (second) the sum of eight hundred and fifty pounds sterling yearly as the rent of the factory, and (third) such provision for bad debts, depreciation on plant, stock, etcetera, as may be considered necessary by my trustees, shall be divided amongst the surviving employees in proportion to the number of shares allotted to them, or to which they may acquire right under these presents, and ten per centum of such profits shall be paid over to them in cash, and the remaining profits shall not be drawn by the employees, but credited to their respective accounts, to be opened in the names of the several employees in the books of R. & J. Dick, until the whole of my capital and interest in the said business is paid out, and the said remaining profits, allotted to the employees as aforesaid, shall be accumulated, without adding interest, and form a fund available for the paying out of my capital in the said business. In the event of a loss arising upon the working of the business in any one year, such loss shall be carried forward until the same shall be wiped out from the profits of succeeding years. It is hereby further provided and declared that the whole of the stocks of balata lying in the factory at Greenhead, or stored outside or abroad, shall be retained by my trustees, and shall remain under their sole control and custody. And further, they shall have power from time to time, as may be required by the business, to sell to the employees such portions of said stocks as they may deem proper, and that at the invoice prices at which said stocks were purchased.

“(Third)—In the event of the death or bankruptcy of any employee prior to or after my death, I hereby provide and declare that his said interest in the profits of the business and in the business itself shall cease as from the commencement of the year in which he may die or become bankrupt, provided he die or become bankrupt after my decease, and his representatives shall only be entitled to be paid the amount standing to his credit in the account in his name in the said books at the balance previous to his death, but such payment shall not be made before all my capital and interest in the business is paid out as hereinbefore provided, and the remaining employees, unless I shall otherwise direct, shall be entitled amongst them to the interest and prospective share of profits which would have fallen to the deceasing or bankrupt employee *pro rata*, according to the respective number of shares they each hold.

“(Fourth)—Upon my death the employees who may then survive and be capable of acting shall carry on the said business as it is carried on by me at the time of my death, and my trustees are hereby empowered to appoint capable managers for conducting the business, and

I recommend my trustees to appoint the said John Edward Audsley to have charge of the counting house and financial part of the business, and to appoint David Kennedy, Belfast, as superintendent of the industrial departments of the business, and my trustees shall have power to depute and grant authority to the said John Edward Audsley, or to any other person or persons, to sign the firm name of R. & J. Dick, it being declared that my trustees shall have the sole power of granting such authority. And I provide and declare that my trustees shall not be required to take any active part in the carrying on of the said business, and in respect of the business being so carried on my trustees shall not be liable for omissions or for negligence, but each for his own actual personal fraud. In the event of any question arising amongst the said employees regarding the appointment and remuneration of managers and foremen connected with the business or scale of wages to the work people, all such questions shall be submitted to and determined by my trustees. And in the event of any of the said employees so misconducting himself as to render it, in the opinion of my trustees, desirable that he should be removed from the business, my trustees shall have the power to do so, and his interest therein and in the prospective profits shall cease and be dealt with in the same way as in the case of a deceasing or bankrupt employee.

“(Fifth)—Farther, my trustees shall be entitled to take payment in so far as the same has not been previously paid (at such times and in such amounts as looking to the requirements of the business they may deem proper) of the amount of profits standing at the credit of the said employees or any of them, and sums so taken shall be debited to my capital account and treated as payments *pro tanto* of the sums standing at my credit in the books of the firm. And further, my trustees shall have right to require payment out of the business from time to time of such proportion of my capital as may not in their judgment be required for the sufficient carrying on of the business, and when the whole of my said capital and interest shall have been fully paid to my trustees, they shall then pay out of the accumulated profits the amount appearing in the books as due to the representatives of deceased or bankrupt employees, and to such employees as may have retired from the business, if there be any such, *pro rata*, or arrange for such payment being made by the surviving employees in such manner as to them shall seem fit; and my trustees shall thereupon convey to the employees who may be surviving at that date the whole business, including the stock-in-trade and other assets, and all the shop businesses, both at home and abroad, and goodwill thereof, and also the factory at Greenhead with the whole machinery, plant, and tools therein, the price of which is hereby fixed at twenty thousand pounds sterling, which shall be paid in addition to the sum stand-

ing to my credit as aforesaid (subject always to the payment by the employees of the debts and obligations of every kind due and exigible from the business), according to their respective interests therein as shown by the number of shares allotted to them, or to which they may have right under these presents, and as appearing from the books of the business.

“(Sixth)—Further, the employees or the survivors of them (but excluding bankrupt, retired, or dismissed employees or their representatives), after my death shall, notwithstanding what is before written, at any time be entitled to purchase from my trustees, and they are hereby empowered and instructed to sell to the employees, the said business, including the foresaid stocks of gutta percha or balata for the capital sum standing to my credit in the books of R. & J. Dick at the time of such purchase, and also the factory and machinery at Greenhead at the price hereinbefore stated, subject always to the payment by the employees of the debts and obligations owing by the business, and I hereby authorise and empower my trustees if they see fit to lend part of the said capital on the security of the said business and assets thereof, or any part thereof. It is understood that my trustees, although they are not to take any active part in the management of the business, shall be entitled from time to time, by themselves or by any other person or persons whom they may appoint for that purpose, to inspect the books of the business in order to ascertain the position of the same, and the yearly balance sheet of the business shall be exhibited to and approved and sanctioned by them after being duly audited, and in the event of the balance sheet in any one year showing a loss, my trustees shall then be entitled to investigate into the causes which have led to the failure of profits, and along with the employees in the management to take such measures as may be deemed most expedient to prevent the recurrence of loss for the future, but in the event of its being found after a fair trial that losses continue to be made, and that the business cannot be carried on at a profit, or that the profits are so inadequate, as in the judgment of my trustees to render it necessary that the business should be wound up, they are hereby empowered so to do and to realise the assets, and after paying thereout the debts and obligations owing by the business, they shall apply the available proceeds, in the first place, in payment of the sum standing to the credit of my capital account (with interest as aforesaid) in the books of the business, and the remaining proceeds shall thereafter be divided amongst and paid to the employees, including the deceased, bankrupt, retired, or dismissed employees or their representatives, if there be any such, in proportion to the amounts standing to their credit in their respective accounts in the books of the business *pro rata*.

“(Lastly)—It is hereby understood and declared that the arrangement herein set forth regarding the disposal of my busi-

ness shall form part of the settlement of my affairs, as if the said arrangement had been embodied in my trust-disposition and settlement. And I reserve power to alter, innovate, or revoke these presents, in whole or in part. And I reserve my own liferent; and I dispense with delivery hereof; and I consent to registration hereof for preservation."

The remaining facts as stated in the case were as follows:—"At the date of Mr Dick's death, on 7th March 1902, his capital in the business amounted to £351,550. At the same date the firm of R. & J. Dick had an overdraft of £143,177 from their bank. It was arranged between the trustees and the employees that the overdraft should be liquidated by the employees before they began to pay out Mr Dick's capital. By the 31st December 1903 the overdraft had been liquidated to the extent of £93,209, and the indebtedness of the business as at 7th March 1902 (date of Mr Dick's death), and at 31st December 1903, was as follows:—

As at 7th March 1902—		
To the bank, . . .	£143,177	
„ „ trustees, . . .	351,550	
		£494,727
As at 31st December 1903—		
To the bank, . . .	£49,968	
„ „ trustees, . . .	351,550	
		401,518

Reduction of indebtedness during the period from 7th March 1902 to 31st December 1903, £93,209

During the same period the accumulated 90 per cent. of the profits of the business credited to the accounts of the employees in the books of R. & J. Dick, under the provisions of the second article of the deed of arrangement, was £72,076, 17s. 1d. The assessable profits of the business for the year ending 5th April 1905, taken on the average of three years to 31st December 1903, amount to £43,441, for which an assessment has been made on R. & J. Dick. The appellant's income from all sources for the year ending 5th April 1905, for the purpose of determining whether he is entitled to abatement, amounts (1) to £561 if his income from the business is taken at his share of the 10 per cent. of profits payable to the employees in cash, or (2) to £2000 if his income from the business is taken at his share of the full amount of profits, whether paid to the employees in cash or credited to their respective accounts in accordance with the provisions of the deed of arrangement."

After consideration of the facts and arguments submitted to them, the Commissioners confirmed the assessment as made. The appellant appealed by way of case stated under the Taxes Management Act 1880 to the Court of Session as the Court of Exchequer in Scotland.

The appellant argued—The share of profits in the business of R. & J. Dick placed annually to his credit in its books was not income. *Tennant v. Smith (Inland Revenue)*, March 14, 1892, 19 R. (H.L.) 1, 29 S.L.R. 492, *cf.* opinions of Lord Chancellor and Lord Macnaghten. £561 was

admittedly all the income of which appellant had the actual enjoyment—why should he be assessed on £2000? If Revenue's argument were sound, a man with only £50 a year to live on might be rated on £1600, which would reduce the argument to a *reductio ad absurdum*. The appellant had not a vested but only a contingent right to his share of the 90 per cent. of profits. For the business might lose all its money, or the trustees owing to losses might decide to wind it up before the testator's estate had been paid out. The withholding of the 90 per cent. of profits was not a matter of contract but of bequest, in this differing from cases of salary deferred, in part, by contract. This distinguished it from *Hudson v. Gribble, Bell v. Gribble*, [1903] 1 K.B. 517, and *Smythe v. Stretton*, 1904, 20 Times L.R. 443, 90 L.T. Rep. 756. In these cases though the whole salary was not actually received, it was because the recipients had voluntarily contracted to have a certain amount set aside, and the legal conception was that they received the whole salary. The present case had no similarity to the case of *Mersey Docks v. Lucas*, June 28, 1883, Law Rep. 8 App. Cas. 891, where the income was actually earned and received. The deed of arrangement did not change the employees into partners; they remained employees, but in addition became beneficiaries as to a small percentage of profits, and prospective beneficiaries in the business itself. The owners of the business were the trustees, who had the decision in the event of loss as to whether the business was to be wound up or not, and who could dismiss the employees for misconduct of which they were judges. The final act of the scheme was directed to be the conveyance by the trustees to the employees, which assumed that up till that time the trustees were the owners.

The respondent argued — *Tennant v. Smith (Inland Revenue)* merely decided that a bank agent in computing his income was not bound to include the annual value of a bank house occupied by him in performance of his duty. The other cases cited by appellant were in respondent's favour. In *Smythe v. Stretton* the deferred salary might be forfeited or lost, and yet the whole salary was held assessable. The principle to be deduced from *Smythe v. Stretton, Hudson & Bell v. Gribble*, and *Mersey Docks v. Lucas*, was that if under the Income-Tax Acts it was found that there does come profit to a company or individual, that profit once earned was liable to tax, whatever the individual might choose to do with it, whether he set it aside voluntarily or compulsorily or not. The appellant's share of the ninety per cent. in question was his profits. The deed of arrangement was really a deed by which the testator directed his trustees to sell his business to the beneficiaries at once, but with deferred payment. The trustees did not carry on the business, and were not liable in a question with the general public. The relation between the trustees and the beneficiaries was that of unpaid sellers and

buyers respectively. The beneficiaries were really partners and proprietors of the business, but were only entitled to a conveyance from the trustees on payment of the price. It was for the appellant to show that the money standing at his credit in the books of the company was not his. He did not discharge the onus by showing that till a certain date (the payment of the price) he could not touch the money, nor did this fact affect the payment of income-tax.

At advising—

LORD STORMONTH DARLING—This appeal arises on a claim by the appellant for abatement of income-tax, which the Commissioners have refused to allow. The claim was made under 61 and 62 Vict. c. 10, sec. 8, on the ground that the appellant's total income from all sources for the year of assessment though exceeding £500 did not exceed £600, and he was therefore entitled to relief equal to the income-tax upon £120. His precise income he stated at £561, made up of £316 of salary (the immediate subject of assessment) and £245 which had already borne tax. It was conceded by the Crown that this sum of £561 was all the income of which he had the actual enjoyment, but they contended that his income from all sources amounted to £2000 a-year if account were taken not only of ten per cent. of the profits of the business of R. & J. Dick paid to him in cash, but of the balance of those profits credited to his account in the books of R. & J. Dick in accordance with a certain deed of arrangement granted by the late Mr James Dick on 4th March 1902. The question for decision is whether this balance of profits was part of the appellant's income for the year of assessment, and that depends on the just construction of the deed of arrangement.

The late Mr Dick, who was the grantor of it, was the sole proprietor of a large and lucrative business in Glasgow as a boot, shoe, and belt manufacturer, and he seems to have conceived the idea that the best means of achieving the double purpose of getting payment of his large capital out of the business after his death, and at the same time benefiting the heads of the various departments of his business, was to give them a prospective interest in the profits, and power ultimately to acquire the business itself.

Accordingly, by the first article of the deed he named fifteen employees (of whom the appellant is one), and he allocated to each of them a number of shares, varying in number from ten to two, and making in all one hundred shares, with a declaration that he might afterwards add to or take from the number of employees, or vary the allotment in such manner as he might think proper, and with the further declaration that the provisions of the deed in their favour should not become vested interests until the whole of his capital and interest had been paid out, and that it should not be competent for them on any ground whatever to sell or dispose of their interest in the profits or in the business itself.

As the deed is printed at length and forms

part of the case, it is unnecessary to enlarge on its provisions; but I may note that there are directions for ascertaining the grantor's capital at the date of his death, and paying interest thereon to his testamentary trustees at the rate of 3 per cent., and that after making these and other deductions the whole profits of the business were to be divided among the surviving employees in proportion to the number of their shares, 10 per cent. of such profits being paid over to them in cash, and the remaining profits being credited to their respective accounts in the books of R. & J. Dick, until the whole of Mr Dick's capital and interest was paid out. As if to emphasise that the interest of the employees in these profits was to be contingent on Mr Dick's own capital being paid out, there was a declaration that the "said remaining profits allotted to the employees as aforesaid shall be accumulated, without adding interest, and form a fund available for the paying out of my capital from the said business." With regard to the management of the business, the deed provided that the employees should carry it on as it was carried on by Mr Dick at the time of his death, but the trustees were placed in a position of absolute control, being invested with the sole right of granting authority to sign the firm name, of appointing managers and superintendents, of settling questions as to salaries and wages, of determining what was to be left in the business as working capital, of deciding whether it could no longer be carried on at a profit and ought to be wound up, and even of removing any of the "said employees" from the business, with the result of depriving him of all future interest in it. The ultimate conveyance of the whole business by the trustees to the employees surviving at that date, subject to its debts and obligations, was not to be made until the whole of Mr Dick's capital and interest had been fully paid to the trustees, but they were entrusted with a discretionary power to lend part of the capital on the security of the business and assets. Lastly, there was a declaration that the arrangement set forth in the deed regarding the disposal of Mr Dick's business should form part of the settlement of his affairs, as if it had been embodied in his trust-disposition and settlement.

Before inquiring into the effect of this deed on the legal position of the appellant and the other employees, there are only a few facts to be noticed. At the date of Mr Dick's death, on 7th March 1902, his capital in the business amounted to £351,550. At the same time the firm of R. & J. Dick had an overdraft of £143,177 from the bank. It was arranged between the trustees and the employees that the overdraft should be liquidated by the employees before they began to pay out Mr Dick's capital; and by 31st December 1903 so prosperous had the business been that the overdraft had been reduced by £93,209. Accordingly, at 31st December 1903 the debt to the bank stood at £49,968; the debt to Mr Dick's trustees stood at its original figure of £351,550; and

the accumulated 90 per cent. of the profits of the business credited to the employees in the books of R. & J. Dick under the provisions of the second article of the deed amounted to £72,076, 17s. 1d. The assessable profits of the business for the year ending 5th April 1905 were £43,441, for which an assessment has been made on R. & J. Dick and paid.

Now, what is the effect of the deed of arrangement on the legal position of these employees until the time arrives for Mr Dick's trustees making a conveyance of the business in their favour? Are they still only employees, with a right to salary and immediate payment of a small percentage on profits, together with a prospective and contingent interest in the business itself? Or are they a purchasing partnership, with immediate entry to the business, but with a postponement of the obligation to pay the price, and only such limitations on their right of property as are necessary to give the seller security for the price? I have no hesitation in adopting the first of these alterations and rejecting the second.

The entire deed seems to me redolent of the granter's desire to keep the business under the control of his trustees until the whole of his capital and interest has been paid out. Till then the employees are to have no vested interest, and are to have nothing to sell or convey. Till then they are not to touch a shilling of the profits except the small percentage, which is much more appropriate to active management by a servant than to the position of a principal. Till then they are to be under the control of the trustees with regard to all the more important questions of policy, including the question whether the business is to be continued or wound up, and they are themselves to be liable to dismissal by the trustees for misconduct, of which the trustees are to be the judges. In the face of provisions such as these, it seems to me impossible to hold that the employees were proprietors, with only some rights of control by an unpaid creditor. Mr Dick seems to me to have intended no more than that the employees whom he desired ultimately and contingently to benefit by the acquisition of the business should have the same kind of management of its practical details as they had formerly possessed in his own lifetime. In short, the business was to be in law and in fact the property of the trustees until the conditions were fulfilled for their conveying it to the employees.

If so, it is impossible to predicate of the appellant that his share of the 90 per cent. of profits was a part of his income for the year of assessment. It was no doubt carried to his credit as a book entry, but it was primarily to form a fund available for the paying out of Mr Dick's capital, and it might never be the property of the appellant at all. Consequently there is no similarity between this case and cases like *Mersey Dock v. Lucas*, 8 App. Ca. 891, where, an income having been actually earned and received, the question was (as explained by

Lord Blackburn at p. 910 of the report) whether the Queen was to have her tax upon it. Here the King has had his tax upon it in the hands of R. & J. Dick, and when the Crown demands that the appellant's presumptive share of these profits shall be reckoned as part of his individual income, the Crown must show that the share is not presumptively or contingently but actually and indefeasibly his.

Neither does it seem to me that this case is governed or even affected by cases where persons in the acknowledged position of servants—like the deputy town clerk of Manchester in *Hudson v. Gribble*, (1903) 1 K.B. 517, or the assistant master at Dulwich College in *Smythe v. Stretton*, (1904) 20 Times L.R. 443—were held not entitled to deduct from assessment for income-tax the proportion of their respective salaries which their employers had withheld in order that it might form a provision for themselves or their representatives in the event of retirement or death. The claim to deduction in *Gribble's* case was based entirely on the Manchester "thrift" scheme, having been authorised by a local statute, which was said to let in a reference to sums payable by virtue of any Act of Parliament in the first rule of section 146 of the Income-Tax Act of 1842. That contention is of course inapplicable here. But even taking the decision apart from that essential distinction, I have no reason whatever to quarrel with it. Of course the mere fact that under a man's contract of service a portion of his salary is held up or deferred for the benefit of himself or those dependent upon him does not the less make it a part of his income. The only point of the Crown's reference to either that or the *Dulwich* case (which was a decision by a single Judge) is that there were provisions in each scheme by which the contributing member might forfeit his contributions, or part of them, for misconduct involving loss to his employers. That is a mere provision for set-off in case of counter-claims arising between master and servant, or, if it extends to forfeiture in case of early termination of the service, it is balanced by the contributor's chance of gaining benefit by the same stipulation when applied to his fellow-contributors. But the deferred portion of the salary is still salary contributed by the servant himself, and there is nothing contingent about it merely because he contracts as to its ultimate application. There is surely all the difference in the world between a case of that kind and one where the contingency is so vital that the fund said to form part of a man's income may, from causes over which he has no control, never be his at all.

I am therefore for reversing the determination of the Commissioners and allowing the abatement claimed.

LORD KYLLACHY, LORD LOW, and the LORD JUSTICE-CLERK concurred.

The Court sustained the appeal and allowed the abatement.

Counsel for the Appellant—Cullen, K.C.
—R. S. Brown. Agent—Henry Robertson,
S.S.C.

Counsel for the Respondent—The Solicitor-General (Ure, K.C.)—A. J. Young.
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of Inland Revenue.

Thursday, December 14, 1905.

FIRST DIVISION.

[Sheriff Court at Inverness.

WARRANT v. WATSON AND OTHERS.

Process—Possessory Action—Interdict—Competency—Property Held pro indiviso—Right of Pro indiviso Proprietor to Protect Property from Encroachment by Outsider—Salmon Fishing.

A *pro indiviso* proprietor is entitled by interdict to protect the property held *pro indiviso*, as for example salmon-fishing, from encroachment by an outsider.

Process—Interdict—Procedure—Trespass—Wrongous Fishing—Fishing Denied, but Right to Fish Asserted—Right to Interdict de plano.

In defence to an action of interdict, brought by the proprietor of a salmon-fishing against certain persons whom he alleged to have on certain specified occasions unwarrantably fished therein, the defenders denied that they had fished, but asserted that they had a right to fish. Held that interdict *de plano* could not be granted, but that there must be inquiry whether the defenders had fished.

Macleod v. Davidson, November 17, 1886, 14 R. 92, 24 S.L.R. 69, distinguished.

Property—Pro indiviso Property—Trespass—Burgh—Salmon-Fishing—Outsider Pleading in Defence of Trespass a Plea to Title Conceivably Open to pro indiviso Proprietors inter se—Indweller of Burgh Asserting Burgh's Right to Property not Claimed by Burgh.

A was *pro indiviso* owner along with the burgh of X of salmon-fishings, A having the right of fishing on seven days and the magistrates and council of X (as representing the community of the burgh) on every eighth day. The burgh's right to fish had not been dedicated to the public, but was only exercised by the public fishing. A having brought an action of interdict against certain of the indwellers of the burgh for fishing on days other than the eighth day, the respondents pleaded that the rights of the burgh as in a question with A were more extensive than the burgh was content to claim, and that as indwellers in the burgh they were, in exercise of those more extensive rights, entitled to fish not only on the eighth but on other days as well.

Held that the indwellers of the burgh were not entitled to plead in defence to a summary action of interdict rights

which the burgh might, as in a question of title, conceivably plead against the other *pro indiviso* proprietor.

This was an action of interdict brought in the Sheriff Court at Inverness by Captain Alexander Redmond Bewley Warrand of Bught, residing at Ryefield House, Conon-bridge, against Donald Watson, fishing-tackle maker, Inglis Street, Inverness, and others, indwellers in the burgh of Inverness.

The pursuer craved the Court "to interdict the defenders and each of them from unlawfully entering or trespassing upon the pursuer's fishings in the water of Ness, known as the "Four Cobles Fishings" and the "Duke of Gordon's Fishings," being the fishings in the said river Ness, between the stone known as the Clachnahagaig and the sea, or upon any part thereof, or in any way interfering with the pursuer's possession, use, and enjoyment thereof, and from taking, fishing for, or attempting to take, or aiding or assisting in taking, fishing for, attempting to take salmon, grise, sea-trout, or other fish of the salmon kind by means of rod and line, or by any other method, from the said fishings, but always under the exception in favour of the Magistrates and Town Council of Inverness, as representing the community of said burgh, (1) of the right of fishing for salmon or any other kind of fish in the said Four Cobles Fishings every eighth week-day, and (2) of the right of fishing for salmon or any other kind of fish in the fishing known as the Friar's Fishing."

The pursuer, *inter alia*, claimed to be, and produced a title as, *pro indiviso* proprietor to the extent of three and a-half cobles of the Four Cobles Fishing in the river Ness, and the town of Inverness was the other *pro indiviso* proprietor. He averred—" (Cond. 7) The only practical way of exercising fishing rights by rod and line in a case similar to the present is to limit the number of rods in proportion to the rights of the respective proprietors, or to allocate certain days to each proprietor in proportion to the extent of his right. By an arrangement entered into between the predecessors of the pursuer and the town of Inverness it was agreed that the Magistrates and Town Council of Inverness, as representing the community of said burgh, should exercise their right of fishing in respect of the one-half coble now vested in them by fishing over the whole of the Four Coble waters once in every eighth week-day, the pursuer's authors on the other hand being permitted to exercise their rights of fishing during all the other days of the season without interference by the Magistrates and Town Council or members of the community of said burgh. This arrangement has been in force for forty years, and the dates on which the town's rights can be exercised are published in the *Inverness Courier* in February of each year. Each fishing-tackle maker in town published a list of said dates, and in particular the said Donald Watson, or the firm of D. Watson & Company, has done so for the last ten or twelve years. The pursuer is absolute pro-