remit to him to allow a proof before answer of the items specified in heads 1 and 3 of the statement, reserving all questions of expenses.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court recalled the interlocutor appealed against, and remitted to the Lord Ordinary to allow the parties a proof before answer of the items specified in heads 1 and 3 of the specification. . . .

Counsel for the Pursuer (Respondent) —G. Watt, K.C.—R. S. Brown. Agent—Robert M. Scott.

Counsel for the Defender (Reclaimer) — Solicitor-General (Ure, K.C.) — W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, March 19.

SECOND DIVISION.

[Sheriff Court at Dumfries.

S.S. "FULWOOD" LIMITED *v.* DUMFRIES HARBOUR COMMISSIONERS.

(Reported *ante*, January 23, 1907, 44 S.L.R. 320.)

Expenses—Decree against "Harbour Commissioners" Unnamed in Summons—At Approval of Auditor's Report, Motion that Decree should be against them as Individuals—Refusal.

In an action brought in the Sheriff Court against "the Commissioners of the Harbour of Dumfries" (neither the summons nor the record in any way indicating who the Commissioners were), the defenders appealed to the Second Division of the Court of Session, which pronounced an interlocutor dismissing the appeal, finding the defenders liable in the expenses incurred in the Court of Session, remitting to the Auditor to tax and report. On the case coming up for approval of the Auditor's report, the pursuers moved the Court to grant decree against the Commissioners as individuals.

The Court *refused* the action, *holding* (1) that such a decree could not be granted against individuals who were in no proper sense before the Court; (2) that in any event the motion was made too late.

The case is reported *ante ut supra.*

The steamship "Fulwood" Limited brought an action in the Sheriff Court at Dumfries against the "Commissioners of the Harbour of Dumfries and the Navigation of the river Nith," to recover damages for injuries sustained by the "Fulwood" at Glencaple Quay. The summons did not mention the names of the Commissioners. The defences contained a statement that "the dues leviable by the defenders have all been assigned in security of borrowed money."

The Sheriff-Substitute assoilzied the defenders; the pursuers appealed to the Sheriff, who recalled the Sheriff-Substitute's interlocutor; the defenders appealed to the Second Division of the Court of Session; and on 23rd January 1907 their Lordships pronounced the following interlocutor:—"The Lords having heard counsel for the defenders on their appeal against the interlocutor of the Sheriff of Dumfries, dated 19th February 1906, Affirm the said interlocutor, with the following additions, viz., . . . With these variations, find in fact in terms of the findings in the said interlocutor: Therefore dismiss the appeal, of new grant decree against the defenders for the sum of £500 with interest as craved, and decern: Find the pursuers entitled to expenses in this Court, and remit to the Auditor to tax the account thereof, and of the expenses found due in the inferior court, and to report."

Upon the case appearing subsequently in the Single Bills for approval of the Auditor's report, the pursuers moved that decree should be granted against the Commissioners individually. The defenders opposed the motion.

Argued for the pursuers—From the defenders' own statements upon record it was plain that the Commissioners *qua* Commissioners had no funds. In such circumstances, rather than grant a decree which would be absolutely useless, the Court would grant decree against the defenders as individuals—see *Young, &c.* v. *Nith Commissioners*, July 6, 1876, 3 R. 991; 13 S.L.R. 636. Such a course was, moreover, in accordance with the ordinary practice of the Court, the harbour commissioners being neither more nor less than trustees, and trustees who litigate being, as was well settled as regarded liability to opponents for expenses, in the same position as if they were litigating as individuals—*Anderson* v. *Anderson's Trustee*, November 13, 1901, 4 F. 96, 39 S.L.R. 94 (Lords Adam and M'Laren); *Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22. Especially was this so where, as here, they embarked in litigation knowing that the trust funds were exhausted. It was absurd to say that the motion was too late; the case was still before the Court, which was not being asked to do anything new, but merely to interpret the interlocutor they had already pronounced by explaining who the "defenders" actually were. A decree in the name of an agent-disburser was analogous. If the motion now made were not granted the pursuers would have to raise another action for their expenses, which was most undesirable.

Argued for the defenders—The motion was made too late. It ought to have been made when expenses were granted—*Warrand* v. *Watson and Others*, January 16, 1907, 44 S.L.R. 311. In any case, however, it could not have been granted—*Young, cit. supra.* The pursuers were suing a corporation and had called no persons individually in their summons, there being nothing before the Court to show who the Commissioners at the time of the raising of

the action were, or whether they now were the same or different. There was no analogy in the case of the agent-disburser.

LORD JUSTICE-CLERK—This motion is as far as I know unprecedented. Certain people called the Commissioners for the Harbour of Dumfries are summoned into Court. They are summoned *qua* Commissioners. They are not named in the summons, and no one can discover from the record who they are. The persons who were Commissioners when the action was raised may all have ceased to be so in the course of the litigation. The judgment of the Sheriff was against the defenders and they appealed. This Court affirmed the judgment of the Sheriff, and the defenders were found liable in expenses in this Court, for I think that a finding that the pursuers were entitled to expenses is just the same thing as a finding that the defenders were liable in expenses, so that as far as this Court is concerned the cause is virtually at an end. The only thing that remains to be done is to remit the pursuers' account of expenses to the Auditor in order to ascertain the amount of the expenses for which the defenders have been found liable, and to pronounce decree for the amount so ascertained, and now when the case comes up for approval of the Auditor's report the pursuers ask the Court to give decree, not against the Commissioners as such, but against certain individuals of whom the Court do not know, and cannot know, anything. I think that it is out of the question to grant such a motion against persons who are not before the Court. In any view I should have been of opinion that the motion comes too late. Mr Spens suggested the analogy of decree for expenses in the name of the agent-disburser. I think that this suggested analogy is no analogy at all. Decree in the name of the agent-disburser is a matter of ordinary practice, a practice which has existed from time immemorial, in accordance with which the agent, who presumably has disbursed the expenses out of his own pocket, is held entitled to obtain decree for expenses in his own name. That is not a matter *in causa* at all. On the whole matter I am of opinion that we should refuse the motion.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court pronounced this interlocutor—

"The Lords approve of the Auditor's report on the pursuers' account of expenses: Ordain the defenders to make payment to the pursuers of the sum of £182, 17s. 7d. sterling, and decern: Further, find the pursuers liable to the defenders in the sum of £3, 3s. of modified expenses for to-day's discussion of the terms of the decree for expenses, for which sum decern."

Counsel for the Pursuers and Respondents—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Appellants—Macmillan. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, March 20.

FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.

INLAND REVENUE *v.* DICK'S TRUSTEES.

(*Vide* also *Walker* v. *Reith*, Jan. 12, 1906, reported 43 S.L.R. 245, and 8 F. 381.)

Revenue—Legacy Duty—Trust to Carry on Testator's Business—Percentage of Profits Given under the Trust to Employees Carrying on the Business—Gift or Remuneration—Legacy Duty Act 1796 (36 *Geo. III. cap.* 52), *sec.* 6—*Revenue Act* 1845 (8 *and* 9 *Vict. cap.* 76), *sec.* 4.

By a deed of arrangement forming part of his testamentary writings a testator provided for his business being carried on and eventually being acquired by certain of his employees, the heads of departments. The trustees signed cheques, arranged salaries, might dismiss employees, or decide as to winding up. After paying depreciation and interest on the testator's capital, 90 per cent. of the profits was to be retained in certain shares on behalf of the employees and used as a fund to pay out the testator's capital, and the remaining 10 per cent. was to be paid to them in the same shares. As soon as the testator's capital was paid out the business was to belong to the employees, but no interest was to vest in them till then. The business having been carried on for some years, and a large sum paid to the employees under the 10 per cent. provision, the Inland Revenue claimed from the trustees legacy duty thereon.

Held that legacy duty was due, the sum being a gift under the will of the testator, and not remuneration. *In re Thorley* [1891], 2 Ch. 613, *applied* and *followed*.

The Legacy Duty Act 1796 (36 Geo. III., cap. 52), sec. 6, enacts that "the duties hereby imposed shall in all cases in which it is not hereby otherwise provided be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument or the administration of the personal estate of any person deceased . . . upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy or any part of any legacy, or of the residue of any personal estate or any part of such residue to which any other person or persons shall be entitled."

The Revenue Act 1845 (8 and 9 Vict. cap. 76), by sec. 4, enacts—"Every gift by any will or testamentary instrument of any person which by virtue of any such will or testamentary instrument is or shall be payable or shall have effect or be satisfied out of the personal or moveable estate or effects of such person or out of any