down as "clear" that the right of an alimentary annuitant, if unprotected by a trust, can be attached by his creditors—an opinion which it is difficult to reconcile either with the authorities in regard to alimentary rights or with the legal principle which underlies the important judgment in *Chaplin's Trustees* v. *Hoile*, 1890, 18 R. 27, 28 S.L.R. 51. An alimentary condition is in its nature as fundamental, as inseparable, and as lawful a qualification of a liferent or of an annuity as is a resolutive condition, though, of course, it operates differently. It should be noted that in the cases of *White's Trustees*, *Murray*, and *Kennedy's Trustees* the relevant authorities were not cited in argument or referred to in the opinions of the Court as would probably have been the case in a competition between an arresting or an adjudging creditor or a debtor whose sole income was derived from what he claimed to be an alimentary liferent or annuity.

LORD CULLEN—I concur in the conclusion reached by your Lordships.

Where an alimentary provision is effectually constituted through the medium of a continuing trust, the trustees holding the fund and paying over the money are placed under a duty to maintain its peculiar character by paying to the beneficiary alone, giving no effect to deeds of his purporting to affect his right to receive it or the diligence of his creditors other than alimentary creditors. Now as I read the marriage contract before us no such trust duty is imposed on the first parties. They are directed, *simpliciter*, to pay the income to the third party as the surviving spouse, and it is only *quoad* that income when she has received it that words are used which purport to place in her a trust for its application to the purposes of alimenting herself and alimenting and educating the children of the marriage, if any. Moreover, the first parties are not in the position of being debarred from allowing effect to all voluntary deeds by her affecting her right to receive the income, for under a later part of the deed they are authorised to accept from her a renunciation or discharge of her right thereto, in whole or in part, in the shape of a consent to the capital funds being paid away to the children.

If there had been children of the marriage alive a question might, perhaps, have been raised as to whether the words "but that in trust only," &c., effectually constituted the income when received by the third party a proper trust estate in her hands, or involved only an obligation on her to aliment and educate the children out of it. There are, however, no children alive, and the trust purported to be placed in her is now solely for the application of the income to her own benefit. This being so, it appears to me that there is no proper trust for alimentary purposes to be considered, and that the third party is in a position to renounce her liferent right as she proposes to do.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Fraser, K.C.—Cooper. Agents—J. L. Hill, Dougal, & Company, W.S.

Counsel for the Second and Third Parties—Macphail, K.C.—Fenton. Agents—Mackenzie & Kermack, W.S.

---

*Saturday, December* 20.

## SECOND DIVISION.

[Exchequer Cause.

## JOHN SMITH & SON *v.* INLAND REVENUE.

*Revenue—Excess Profits Duty—Deductions—Purchase Price of Coal Contracts—Finance (No. 2) Act* 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) *and* (2), *and Schedule IV, Part I, secs.* 1 *and* 3, *and Part III, sec.* 1 (*a*).

A coal merchant carrying on business under a firm name instructed his trustees under his trust-disposition and settlement to make over his business with its whole assets to his son at a valuation. One of the items at his death on 7th March 1915 consisted of certain coal contracts which were entered in the valuation at £30,000, and none of which extended beyond 31st December 1915. In a question between the son, carrying on the business, and the Inland Revenue, *held* (*dis.* Lord Salvesen) that for the purpose of ascertaining the profits for the accounting period, from 7th March 1915 to 31st December 1915, the £30,000 was not an admissible deduction.

*The City of London Contract Corporation, Limited* v. *Styles*, 1887, 2 Tax Cases 239, *approved* and *applied*.

*Revenue—Excess Profits Duty—Deductions—Remuneration of Manager—Discretion of Inland Revenue Commissioners—Finance (No. 2) Act* 1915 (5 *and* 6 *Geo. V, cap.* 89), *Schedule IV, Part I, sec.* 5.

The Finance (No. 2) Act 1915, Schedule IV, Part I, section 5, dealing with the computation of profits for the purposes of excess profits duty, enacts—"Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for these purposes in the last pre-war trade year, or a proportionate part thereof as the case requires. . . ."

A firm of coal merchants being assessed to excess profits duty for the period from 7th March 1915 to 31st December 1915, claimed as a deduction the sum of £20,615, 17s. 9d., being the remuneration of their business manager. The sum in question was not calculated by reference

to the profits of any section of the business, but was one-third of the profits of the firm. The manager was not an employee of the firm before the outbreak of war, and in the last pre-war year no sums were allowed or paid for the remuneration of managers. The Commissioners of Inland Revenue allowed the sum of £1644 for remuneration for the period in question, being at the rate of £2000 per annum. *Held*, in a stated case against a decision of the Commissioners for General Purposes refusing to interfere with this allowance, that under the Finance (No. 2) Act 1915, Schedule IV, Part I, section 5, the Commissioners of Inland Revenue were the final judges in the matter, and that the Commissioners for General Purposes had no jurisdiction to interfere.

*Rex* v. *Inland Revenue Commissioners*, [1918] 1 K.B. 143; *Williamson Film Printing Company* v. *Inland Revenue Commissioners*, [1918] 2 K.B. 720; *Inland Revenue Commissioners* v. *Auld*, [1919] 2 I.R. 66, *approved* and *followed*.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), dealing with the computation of profits for the purpose of excess profits duty, enacts—Section 40 (1)—"The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purpose of this part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the first part of the Fourth Schedule to this Act and to any other provisions of this Act." Section 40 (2) provides for the ascertainment of the capital in terms of the third part of the Fourth Schedule and the percentages to be allowed on the capital.

The Fourth Schedule, Part I, enacts—Section 1—"The profits shall be taken to be the actual profits arising in the accounting period; and the principle of computing profits by reference to any other year or an average of years shall not be followed." Section 3—"Deductions for wear and tear or for any expenditure of a capital nature for renewals, or for the development of the trade or business or otherwise in respect of the trade or business, shall not be allowed, except such as may be allowed under the Income Tax Acts. . . ." Section 5 is quoted *supra* in rubric. Part III, section 1—"The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be—(*a*) so far as it consists of assets acquired by purchase, the price at which those assets were acquired, subject to any proper deductions for wear and tear or replacement. . . ."

John Smith & Son, shipping and coal agents, Glasgow, *appellants*, being dissatisfied with a decision of the Commissioners for General Purposes of the Income Tax Acts for the Division of the City of Glasgow in the County of Lanark on 25th June 1917, took an appeal by way of Stated Case, in which John Moore, surveyor of taxes, Glasgow, was *respondent*. The case dealt with (1) a claim by the appellants to have £30,000, which had been paid for unexpired coal contracts, deducted for the purposes of excess profits duty from the profits for the accounting period from 7th March 1915 down to 31st December 1915; (2) a claim to have £20,615, 17s. 9d., described in the profit and loss account as management salary of Thomas Keith Fair for the accounting period in question, instead of £1644, the sum authorised by the Commissioners of Inland Revenue, allowed as a deduction from the profits made during the period in question. At the hearing before the Commissioners counsel for the appellants withdrew a claim to have the £30,000 paid for unexpired coal contracts deducted for income tax purposes from the profits of the year ending 31st December 1915, but maintained his claim under the excess profits duty appeal.

On the first branch of the appellants' case the following narrative of the *facts of the case* is taken from the opinion of the Lord Justice-Clerk:—"This case raises questions as to whether two sums of £30,000 and £20,615, 17s. 9d. are liable to be included in the appellants' profits for purposes of excess profits duty. The facts giving rise to the questions are that the deceased John Smith junior carried on the business of a coal merchant under the name of John Smith & Son. On his death he instructed his trustees under his trust-disposition and settlement to make over his business with its whole assets to his son, the appellant, at a valuation (nothing falling to be charged for goodwill), all as prescribed by said trust-disposition and settlement. One of the items in the valuation was £30,000, being the amount to be paid as the value of coal contracts. The accountants reported as to this item as follows:—'With reference to the value placed upon the coal contracts current at the date of the truster's death, we have to report that in view of the many contingencies as at that date, viz., 6th March 1915, *inter alia*, the duration of the war, Government export restrictions, freight difficulties, the terms of the contracts as to deliveries, &c., and in view, further, that any sale of the contracts to outsiders might not have been recognised by the colliery owners, we consider that the value (£30,000) placed on same, which we understand has been agreed to by Mr John R. Smith and the trustee, is in all the circumstances a fair and equitable one. It appears to us very doubtful if, in view of all the above contingencies, such a large sum would have been given at the date of the truster's death by any outside party taking over the business and all the risks and responsibilities under the contracts.' Statement 6 is in the following terms:—'(6) The said coal contracts were entered into by the late John Smith junior and several colliery owners, and by the contracts the latter agreed to deliver to the former certain quantities of coal at fixed prices. The said contracts had various terms of duration, but none extended beyond 31st December 1915.' In statement 7 the £30,000 is stated to have been shown in the profit and loss account, there referred to as 'Sums paid

to the trustees of the late John Smith, being agreed-on value of current contracts taken over by the new firm.'"

On the second branch of the appellants' case, the Case stated—"(8) The appellants admitted that the said Thomas Keith Fair was son-in-law of the late John Smith junior and brother-in-law of John Ross Smith; that he signed cheques on behalf of the appellants; that together with John Ross Smith he managed the business of the appellants, and was a manager or a person concerned in the management of the business; that the said sum of £20,615, 17s. 9d. paid to him was not calculated by reference to the profits of any section of the business, but consisted of one-third of the profits of the firm; that he was not an employee of the business before the outbreak of the present war; and that in the last pre-war trade year no sums were allowed or paid for remuneration of managers."

The Case further stated—"IV. After considering the whole of the facts and arguments the Commissioners held for the purposes of the excess profits duty—(1) that the sum of £30,000 paid to the trustees of the late John Smith junior for unexpired coal contracts was not an admissible deduction from the profits of John Smith & Son during the accounting period from 7th March 1915 to 31st December 1915; and (2) that as it had been admitted in evidence that Mr Thomas Keith Fair is a manager or person concerned in the management of the business, the question of the amount to be deducted in respect of his remuneration is one entirely for the determination of the Commissioners of Inland Revenue in London, and consequently the Commissioners for General Purposes of the Income Tax Acts in Glasgow have no jurisdiction in the matter. The Commissioners accordingly refused the appeal."

Argued for the appellants—(1) The £30,000 in question was one of the assets of the estate at the death of the testator and the son was entitled to get it at the valuation put on it. It was so much added on to the cost of the coal in the year. It was a sum necessarily incurred in earning the profits of the year—Finance (No. 2) Act 1915 (5 and 6 Geo. V., cap. 89), secs. 38, 40 (1), 45 (2), Sched. 4, Pt. 1, secs. 1 and 5; Income Tax Act 1842 (5 and 6 Vict. cap. 35), Sched. D. sec. 100; *Gresham Life Assurance Company* v. *Styles*, 1892 A.C. 309, *partic. per* Lord Halsbury, L.C., at p. 315, and Lord Herschell at p. 321; *Inland Revenue* v. *Stewart & Lloyds Limited*, 1906, 8 F. 1129, 43 S.L.R. 811; *Farmer* v. *Scottish North American Trust, Limited*, 1912 S.C. (H.L.) 26, 49 S.L.R. 114; *Moore* v. *Inland Revenue*, 1915 S.C. 91, *partic. per* Lord President at p. 96, 52 S.L.R. 59; *James Waldie & Sons* v. *Inland Revenue*, 1919, 56 S.L.R. 602; *City of London Contract Corporation, Limited*, 1887, 4 T.L.R. 51, 2 Tax Cas. 239; *Vallambrosa Rubber Company Limited* v. *Inland Revenue*, 1910 S.C. 519, 47 S.L.R. 488. (2) Rule 5 of Part I, Sched. 4, of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) was not intended to apply where a manager was brought in for the first time—Finance Act 1916 (6 and 7 Geo. V, cap. 24), section 49 (2). There had been no increase in the remuneration at all in the present case, because the manager had nothing to start with.

Argued for the respondent—(1) The £30,000 was an outlay of a capital nature, and therefore not admissible as a deduction—Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 159. It was not the price of coal, but the price for the acquisition of a contract which belonged to the old firm. The coal would have to be paid for at the contract price—*City of London Contract Corporation, Limited* v. *Styles* (*cit.*); [the Lord Justice-Clerk referred to the *Alianza Company, Limited* v. *Bell*, [1905] 1 K.B. 184, at p. 193]; *The Royal Insurance Company* v. *Watson*, [1897] A.C. 1, *partic. per* Lord Halsbury at p. 6; *Coltness Iron Company* v. *Black*, 1881, 8 R. (H.L.) 67, *partic. per* Lord Penzance at p. 70, 18 S.L.R. 466. What the appellant bought was a right to call for goods, which might be a benefit apart from the goods. Profit was the difference between the receipt for the goods sold and the actual expense of selling them within the year—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Sched. IV, Part I, sec. 11, and Part III, secs. 1 (*a*), 2.

At advising—

LORD JUSTICE-CLERK—[*After the foregoing narrative of facts, and after a narrative of the sections of the Finance (No. 2) Act* 1915, *quoted supra*]—The appellants' case was that the whole £30,000 should be deducted, while the respondent contended that no deduction should be allowed from or in respect of the £30,000. No case was presented for either party for any restriction or modification thereof.

In the balance sheet made up as at the truster's death the £30,000 is entered against "coal contracts, amount to be paid as value of same." In my opinion the £30,000 paid for and as the value of the coal contracts formed part of the capital of the new concern during the accounting period under the statute of 1915. The £30,000 is entered, and I think rightly entered, in the balance sheet dated 27th October 1915 as part of the capital of the business as at 6th March 1915, when John Smith junior died, under the item "value of coal contracts." That sum of £30,000 was also entered in the profit and loss account for the accounting period as having been paid out of the profits for that period.

I am of opinion, on a proper construction of the Act of 1915, that the sum of £30,000 was a payment for the purchase of part of the capital of the new concern, and that though the new concern thought proper to apply part of their profits for the purpose of paying for that part of their capital assets represented by coal contracts, that does not cause the part of the profits so applied to cease to be profits or free it from the charge of excess profits duty.

This £30,000, when it was agreed to be paid, was not to be paid as the price of coal belonging to the firm of which John Smith junior was the sole partner. John Smith junior was not possessed of, or the owner of, any such coal. But he was in right of contracts under which he was entitled to

receive coal from certain coal owners at what had become in consequence of the state of the coal trade favourable prices for the buyer. These contracts gave John Smith junior certain valuable rights (what are called in English law choses in action) which he was entitled to sell, and which formed part of the assets of the business belonging to him. Such contractual rights or choses in action as we are here dealing with may be made subject of assignment and sale—Bell's Prin., section 1459; *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1900) [1903] A.C. 414; *Scottish Australian Mining Company* v. *New Redhead Estate and Coal Company*, decided in the Privy Council 27th November 1919. But no question is raised as to the transferability of the rights under said contracts in this case. But such rights are not goods in any sense. They are expressly excluded from the definition of goods under the sale of Goods Act 1893, and I cannot regard the price paid for them as being the price of coal which the appellants' business subsequently acquired, though the appellants having bought these rights were entitled by virtue of that purchase to buy coal from somebody else on more favourable terms than but for the purchase of these contractual rights they could have done.

The appellants founded very strongly on the *Scottish North American Trust* (1912 S.C. (H.L.) 26), and particularly on Lord Atkinson's judgment at the foot of page 29, and on *J. & M. Craig (Kilmarnock) Limited*, 1914 S.C. 338. Of course these judgments are binding on us, and I accept and respectfully agree with them. But they do not appear to me to affect the present case. They were both before the passing of the Act of 1915, and were therefore in no way affected by the statutory definition of capital contained in the schedule to that Act.

This is the result at which I would have arrived apart from authority and on the construction of the 1915 Act, but I am further of opinion that this point has been dealt with by judical authority, which, though it may not be binding on us, seems to be thoroughly sound, and though pronounced on a construction of income tax legislation seems also to be equally applicable to excess profits duty. I refer to the cases of *City of London Contract Corporation* v. *Styles* (1887, 2 Tax Cases, 239) and the *Alianza Company* v. *Bell*, [1905] 1 K.B. 184. I think the appellants entirely failed to show that the reasoning in these cases did not apply to the present case, or to assail successfully that reasoning.

I am therefore of opinion that the appeal as to the £30,000 fails.

The facts as to the other branch of appeal are as follows—the £20,615, 17s. 9d. is management salary paid to T. K. Fair, and sought to be deducted from the profits made during the accounting period. The Commissioners of Inland Revenue have under this head allowed a deduction of £1644, being at the rate of £2000 a-year. [*His Lordship here read statement 8 in the case, and the terms of the decision of the Commissioners, which are quoted supra.*]

This part of the appeal depends on the construction of section 5 of Part 1 of the 4th Schedule. In my opinion that section entirely supports the view given effect to in the finding of the Commissioners appealed against, and the appeal on this head also fails.

It appears to me the point is ruled by the cases of *Rex* v. *Inland Revenue Commissioners*, [1918] 1 K.B. 143; *Williamson Film Printing Company* v. *Inland Revenue Commissioners*, [1918] 2 K.B. 720; and *Inland Revenue Commissioners* v. *Auld*, [1919] 2 I. R. 66.

LORD DUNDAS concurred.

LORD SALVESEN—I have the misfortune to differ from the rest of your Lordships, so that my opinion has no influence on the decision, but as I have formed a clear opinion that the Commissioners reached an erroneous result it is my duty to explain my reasons.

In the *Scottish North American Trust, Limited* (1912 S.C. (H.L.) 26, 49 S.L.R. 114) Lord Atkinson said (at p. 29) in the course of delivering judgment—"The profits and gains of any transaction in the nature of a sale must in the ordinary sense consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell or produce and sell the article vended." This simple proposition appears to me to be sufficient for the disposal of the case. The appellants bought at a valuation certain coal contracts into which their predecessors had entered for delivery of certain quantities of coal during the year of assessment. Had there been no rise in the market price of coal since the contracts were made, or in other words, if the appellants had been able to contract for coal at the same rates as those in the current contracts which they took over, these current contracts would have had no value as subjects of sale. As in this case, however, £30,000 was the value put on the right to obtain delivery at the date of the late John Smith junior's death, it may be assumed that coal had at 7th March already risen largely in price, and a further large rise enabled the appellants not merely to pay the £30,000 and the contract prices of the various lots of coal purchased but to make very large additional profits. On these they do not dispute their liability to be assessed for excess profits duty. But that they should also have to pay excess profits duty on part of the purchase price of the coal by the sale of which they made their profits is a proposition to which I cannot give my assent. If they had not paid the £30,000 they could not have got delivery of the coals by the sale of which their profits were made. On the same principle the price they paid to the collieries ought also to be deducted, although this is not suggested. But the £30,000 is just part of the price to them of the goods in the sale of which their business consisted. They bought the coals not from the colliery direct but from a middleman, who demanded a profit before he would part with his rights. An article may be sold several times over at increasing prices and each vendor may make a profit by the trans-

action, but the excess of the price that the last speculator obtains for the article over and above what he paid is the profit which he makes—not the difference between the price at which the article was first bought from the producer and the price at which after having changed hands several times it was ultimately sold to the consumer. In my opinion the case would be exactly the same if the coals had all been delivered and lay in the vendor's yard, but he had refused to sell them unless he got £30,000 more than he had himself paid for the coals. A right to obtain coals under a contract with a colliery is for commercial purposes equivalent to possession of the actual coals, and in the coal export trade it is common knowledge that this is the ordinary way in which coals are dealt in. The coals are not binged, but are sent direct to the ships by which they are to be exported, the sale being effected by the purchaser from the colliery.

Had there been no further rise in price, but the appellants had simply realised by sale the price paid by them (including the £30,000), the result would have been that in your Lordships' view they must be assessed as for excess profits on this sum, or in other words, would have to pay £18,000 out of capital in name of excess profits duty although they had not earned a penny of profit. I can find no warrant for so construing the statute. Its object was not to confiscate capital used in trading, but to levy a tax on profits made by trading. Where no profits are made the Act has no application. I am therefore of opinion that the appellants are entitled to the deduction of £30,000 which they claim before being assessed on the balance for excess profits duty.

On the other point raised I agree with the finding of the Commissioners.

LORD GUTHRIE—The Commissioners have decided that the sum of £30,000 paid for unexpired coal contracts by the appellants to the trustees of the late John Smith junior (at his death the sole partner in the firm) in connection with the acquisition by the appellants, under the provisions of John Smith's will, of the business previously carried on by him, cannot, either for income tax purposes or in a question of excess profits duty, be deducted from the profits of the business. The appellants have withdrawn their claim for deduction for income tax purposes, and I take the case as if no such claim for deduction had been made, and on the footing that they make no admission of liability, and that their actions do not imply any admission of liability for income tax purposes.

The question depends on whether this sum of £30,000 is to be treated as capital or as income. It was argued that the sum in question was not capital, because, although part of the price paid by the new firm in connection with the acquisition of the old firm's business, it was paid for rights which had expired within a year from the death of the late John Smith junior and the acquisition of the business under his father's will by John Ross Smith, his son, the present sole partner. As I understood the argument, it was scarcely disputed that if the deliveries under the contracts had extended over a period of years, the sum paid therefor must have been treated as part of the capital of the business. It was argued that the case of the *City of London Contract Corporation* v. *Styles* ([1887) 2 Tax Cases, 239) did not apply, because for aught that appeared in that case the unexpired contracts there in question might have extended over a series of years.

I am unable to distinguish the present case from that of *Styles*, and I think that the decision in that case was right. It seems to me that the expenditure of this sum of £30,000 was made as part of the arrangements for acquiring the business. The money was spent for the right to stand in the position of the old firm under certain coal contracts. In the words of Lord Justice Bowen in the case of *Styles* it was capital used to acquire the concern. It was said that the sum in question was in the same position as if the coal deliveries to which the firm became entitled had been in bing in the firm's yard at the death of John Smith junior. I cannot assent to this view. I do not agree that the price paid by the new firm to the trustees of John Smith junior for such a bing could have been deducted from annual profits in a question of excess profits duty. But suppose it could, the property in a bing of coal and the right to get deliveries of coal of unknown amount at unknown prices seem to me essentially different things. Had the subject in question been a bing of coal I suppose, on the appellants' argument, the amount saleable within a year after the beginning of the new firm would fall to be deducted, and the amount not realisable till a later period could not be so treated.

But I am also of opinion that, whether the case of the *City of London Contract Corporation* v. *Styles* is well decided or not, and whether it is applicable or not, the matter is settled by the express terms of the Fourth Schedule to the Finance Act 1915 No. 2, Part 3, section 1. The rights bought by the new firm from the late Mr Smith's trustees seem to me assets of the business acquired by purchase, and the sum of £30,000 is the price at which these assets were acquired. If so, this sum is part of the capital of the trade or business. It cannot fall under the exception in the opening words of the section, for it is not money in the hands of the firm, and if the word "money" can be construed in a taxing statute to include money's worth, which I do not think it can, it is not in my opinion money's worth.

On the second question I agree with your Lordships.

The Court dismissed the appeal and affirmed the determination of the Commissioners.

Counsel for the Appellants—Constable, K.C. — D. P. Fleming. Agents — Arch. Menzies & White, W.S.

Counsel for the Respondents—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.