makes any difference. Another point was taken—that in *Cowan's* case the question of title was not raised, and that the case of *Ewing* was not cited. Also for the reasons already explained, that can make no difference in the present case. Then it was suggested that in *Cowan's* case the pleadings showed that it was the individual wrongdoers and not the trustees who were sued. I think it is quite plain from the report and from the pleadings that in that case the Court considered they were interdicting the trustees from laying on assessments and from levying rates.

The only point argued upon the merits of the case was one on the terms of the statute—that this was, under section 43, only an extension of existing works. I think, when the circumstances of the scheme are examined, it will be found that that argument is untenable.

Therefore I think that the complainers have a title, and, on the merits, that the respondents have no defence.

It is right to notice one point which was pressed, which is this, that the respondents are here protected by the provisions of the Public Authorities Protection Act of 1893. That Act protects persons who are acting in the execution of a statutory or other public duty to this extent, that proceedings must be brought within six months next after the act or neglect or default complained of. I do not think it is necessary to go into the question whether the provisions of that Act apply to such a case as we are dealing with here. The conclusive answer is that it is impossible to say that there was any act to which the complainers could have objected until the resolution of the Town Council in September. The contrary argument was that the wrong was done when the expenses were paid. In my opinion the wrong was done in September, because until that date the complainers could not be certiorated whether or not the respondents were going to take the necessary amount out of the common good. Accordingly on the question of date I think that any argument founded upon the Public Authorities Protection Act fails.

I propose to your Lordships that the same course should be followed here as was followed in the case of *Falkirk*. This is an application for interdict, and, of course, to put the respondents under interdict forthwith would be a stringent remedy. In order that the respondents may consider their position I would suggest that an interlocutor should be pronounced repelling the whole pleas-in law for the respondents; finding that they are not entitled to impose any assessment or levy or exact any rates upon the complainers under the Aberdeen Water-works Act 1862 and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of the costs incurred by the Lord Provost, Magistrates, and Town Council of the Royal Burgh of Aberdeen in connection with the application made by them in Session 1910 to the Secretary for Scotland, under the Private Legislation Procedure (Scotland) Act 1899, for a Provisional Order to enable them to obtain a new supply of water from the river Avon and in connection with the promotion of a Private Bill in the same session for the same purpose; and continuing the cause.

LORD PRESIDENT—I agree. I hope in this case there can be no difficulty, because we are given to understand that there is common good from which the money can be taken. I should like to add this—I do not understand how the Public Authorities Protection Act can ever be prayed in aid in a question of interdict, because I take it the Court can only give interdict against what is a continuing wrong.

LORD KINNEAR—I concur.

LORD PRESIDENT—LORD JOHNSTON also concurs.

The Court recalled the interlocutor of the Lord Ordinary and repelled the respondents' pleas-in-law.

Counsel for Complainers — Moncrieff, K.C.—Lippe. Agents—Dalgleish, Dobbie, & Company, S.S.C.

Counsel for Respondents — Dean of Faculty (Dickson, K.C.)—Chree, K.C. — Mercer. Agents — Gordon, Falconer, & Fairweather, W.S.

Tuesday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

MACPHERSON & COMPANY *v.* INLAND REVENUE.

Revenue—Income Tax—Person not Resident in United Kingdom—Trade Exercised in United Kingdom—Commission Agency — Agent in United Kingdom Selling Goods for Foreign Principal—Income Tax Acts 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 41, *and* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Sched. D.*

The Income Tax Act 1842, sec. 41 (as amended by the Income Tax Act 1853, sec. 5), enacts—"Any person not resident in [the United Kingdom], whether a subject of Her Majesty or not, shall be chargeable in the name of . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in [the United Kingdom] and in the actual receipt thereof. . . ."

The Income Tax Act 1853, sec. 2, Sched. D, imposes income tax, *inter alia*, "For or in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . any profession, trade, employment, or vocation exercised within the United Kingdom. . . ."

Circumstances in which *held* that a Belgian firm which manufactured yarns in Belgium and sold them in this country through a firm of commission agents resident in Glasgow was exercising a trade within the United Kingdom, and was accordingly chargeable in the name of these agents in respect of the profits arising from the said trade.

The Income Tax Acts 1842 and 1853 (5 and 6 Vict. cap. 35, and 16 and 17 Vict. cap. 34), so far as requisite, are quoted *supra* in the *rubric*.

H. S. Macpherson & Company, Glasgow, were assessed under Schedule D of the Income Tax Acts as agents for Peltzer et fils of Verviers, Belgium, in respect of profits derived by Peltzer et fils from carrying on the trade of vendors of yarn within the United Kingdom. Macpherson & Company *appealed* to the Commissioners for the General Purposes of the Income Tax Acts, who held that the appellants were liable to assessment. The appellants thereupon required the Commissioners to state a Case for the opinion of the Court of Session.

In the Case the following *facts* were stated as having been proved or admitted:—"(1) Peltzer et fils are manufacturers of yarns at Verviers in Belgium. (2) The appellants carry on business as yarn merchants and commission agents in Glasgow, and are agents for the sale of the yarns of Peltzer et fils in the United Kingdom. (3) The appellants stated that they have no written agency agreement between them and Peltzer et fils, but they are paid by commission on the business done, and are liable for one-half of the bad debts. (4) The offers received by the appellants are submitted to Peltzer et fils for approval, and, if approved, contracts are entered into in this country by the appellants on behalf of Peltzer et fils. (5) The goods are consigned to the appellants for delivery to the customers in this country, to whom the goods are invoiced by the appellants in the form of invoice produced. (6) The appellants send account sales to Peltzer et fils monthly. A quarterly statement is rendered for expenses and commission. (7) The appellants receive payment for the goods and discharge the accounts on behalf of Peltzer et fils."

Certain documents were produced and formed part of the Case, which, *inter alia*, included correspondence between the appellants and a customer, and also between the appellants and Peltzer et fils, leading up to a contract for the sale of yarn, which showed that to the knowledge of the customer his offer before being accepted had to be referred to Peltzer et fils for approval, and that the appellants had no discretion as to the price at which the yarn was to be sold.

Argued for the appellants—The question was whether Peltzer et fils could be said to be carrying on a trade in this country, keeping in view the distinction between trading with the United Kingdom and trading within the United Kingdom which was drawn by Lord Herschell in *Grainger & Son* v. *Gough*, [1896] A.C. 325. That was a jury question to be determined on an examination of the whole circumstances. The place where the contracts were made, the place where the goods were delivered to customers, and the place where payment was made were no doubt the most important circumstances—*Crookston Brothers* v. *Inland Revenue*, 1911 S.C. 217, 48 S.L.R. 134—but in determining where these various incidents of the trade took place it was necessary to look to the substance of the transaction. The most essential element was the place where the contracts were concluded. In the present case, to the knowledge of the customer, the price was fixed in Belgium, and the making of profit depended on the fixing of the price. Macpherson & Co., moreover, were not responsible for the financial stability of the customers. The sale was therefore in substance made in Belgium. In any case these criteria were not either separately or taken in conjunction conclusive. Here there were other circumstances to be noted. No stock of goods was kept in the United Kingdom, and the appellants merely passed on particular parcels of goods to particular customers. Peltzer et fils had no office and had not their name on any business premises in this country, and they had no bank account here. The appellants were merely the ordinary commercial channel through which the goods of Peltzer et fils were distributed. What the statute was intended to strike at was a foreign firm having a branch in this country. Here there was no branch, but just the normal case of commission agency. There was no person employed by Peltzer et fils in this country at all. Moreover, the appellants did not have any profits in their hands, and had no means of telling whether a profit was made or not. The cases where foreign firms had been held liable to pay income tax were all distinguishable. In *Watson* v. *Sandie & Hull*, [1898] 1 Q.B. 326, the goods were shipped to this country before the contracts were made, and the agents in this country had full discretion as to prices. They invoiced the goods in their own names and guaranteed payment by the customers. In *Turner* v. *Rickman*, (1898) 4 T.C. 25, the agents paid freight, were liable for damage in transit, and a stock of goods was kept in this country. In any event that case could not stand with *Grainger & Son* v. *Gough* (*cit.*) In *Pommery & Greno* v. *Apthorpe*, (1886) 56 L.J.Q.B. 155, 2 T.C. 182, the foreign firm kept a stock and had an office and a bank account in this country. In *Werle & Company* v. *Colquhoun*, (1888) 20 Q.B.D. 753, there was an office in this country, and the contracts were concluded in the United Kingdom in the fullest sense of the word.

Argued for the respondent—Peltzer et fils were carrying on a trade in this country. If contracts were concluded on behalf of a foreigner, and the goods delivered and payment made, all within the United Kingdom, the foreigner would

be held to exercise a trade in this country —*Crookston Brothers* v. *Inland Revenue, cit., per* Lord Dundas. These three elements were all present here. In *Grainger & Son* v. *Gough, cit.*, the contracts were not made, and the goods were not delivered in this country. The fact that the appellants had not the information necessary to make a return was immaterial—*Pommery & Greno* v. *Althorpe, cit., per* Denman, J. The person really assessed was the foreigner. The Crown attacked the only person available, viz., the agent in this country. There was no hardship involved, as the agent was entitled to retain so much of the principal's money as was sufficient to pay the assessment.

LORD PRESIDENT—The question in this class of case really comes to be a question of fact—whether foreign merchants do or do not exercise a trade within the United Kingdom. The mere fact that they are attacked, so to speak, not directly but through their agents, is an accident. Section 41 of the Income Tax Act of 1842 allows the Revenue to collect the tax easily by proceeding against an agent in whose hands are the principal's moneys. Now in this case the agents are thus proceeded against, but there is no controversy that the agents have principal's money in their hands, and therefore there is no difficulty of the kind which wrecked the case of *Crookston* v. *Inland Revenue.*

Coming to the question of whether Peltzer et fils are or are not exercising a trade in the United Kingdom, I rather think that it is truly a jury question. I do not think I should be adding to the store of knowledge in the profession if I went through again the long series of cases which have been decided on these points, all the more so because that has been done with great minuteness by the various learned Judges who delivered opinions in the case of *Crookston Bros.* v. *Inland Revenue*, and were I to do so I should be doing little more than repeating what they there said. I therefore go straight to the facts of this case. Although it is a jury question, the facts are found for us. No doubt in these Revenue cases we are always entitled, as an Appeal Court, to draw inferences from the facts, but the facts themselves come before us, not on a proof but in the form of findings. When I turn to the case I find that offers to buy goods at a price named are received by the appellants and are submitted to Peltzer et fils for approval, and, if approved, contracts are entered into in this country by the appellants on behalf of Peltzer et fils; and I find also that the goods are consigned to the appellants for delivery to the customers in this country, to whom the goods are invoiced by the appellants. I find further that the appellants received payment for the goods and discharged accounts on behalf of Peltzer et fils. Now if all those facts are given to me as true, I am driven to the conclusion that Peltzer et fils are exercising a trade in this country, and if so they are liable in respect of the profits they make upon that trade. They are properly attacked through their agents Messrs Macpherson & Company, who if they do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown.

Upon the whole matter I am of opinion that the determination of the Commissioners is right.

LORD MACKENZIE—I am of the same opinion. The case as put to us by Mr Macmillan was really this—Taking the facts as found here, would any man say, in a popular sense, that Peltzer et fils were exercising a trade within the United Kingdom? Would a person not come to the conclusion that they were trading with the United Kingdom? I think the facts that have been found would lead the ordinary man to the conclusion that they were exercising a trade within the United Kingdom. What leads me to that conclusion is that contracts are made in this country by the appellants on behalf of Peltzer et fils, that apparently the appellants have a system by which they send account sales to Peltzer et fils monthly, and a quarterly statement is rendered for expenses and for the commission paid by Peltzer et fils to Macpherson & Company. Macpherson & Company receive payment for the goods. They discharge the accounts on behalf of Peltzer et fils, and the goods are consigned to Macpherson & Company for delivery to the customers in this country. That seems to me to be sufficient to lead to the reasonable conclusion that Peltzer et fils are carrying on business within the United Kingdom. The argument was used that no branch of Peltzer et fils had been opened in the United Kingdom. Personally that argument would or would not move me in a case of this kind, according to the description of the article dealt in. One can quite well imagine that it would be very difficult to say that the trade of selling certain goods could be carried on within the United Kingdom without having a branch in cases where it is necessary for a customer to see, handle, or sample the goods; but when one looks to the nature of the goods disclosed in the documents before us, it does not appear to me that that argument is of very much weight in this case.

The other points made in regard to there being no exhibition of the name Peltzer et fils and their having no banking account must be answered, I think, by applying this test—If anyone desired to get Peltzer et fils' goods in Scotland or in the United Kingdom, would he or would he not be able to get the necessary information to enable him to supply himself with them? I think there is sufficient on the facts before us to enable one to say that such a person would be told—"You can get Peltzers' goods quite well here. Go to their agents Macpherson & Company, in Glasgow."

With regard to the Solicitor-General's

answer to the suggested practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not one with which the Court have to deal. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether that can be done in a satisfactory manner or not. Accordingly I do not think we require to go into that matter in order to arrive at a conclusion in regard to this case. I am of opinion that the determination of the Commissioners is right.

LORD CULLEN—I entirely concur.

LORD KINNEAR and LORD JOHNSTON were not present.

The Court dismissed the appeal.

Counsel for the Appellants—Macmillan, K.C.—Hon. William Watson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Respondent—Solicitor-General (Anderson, K.C.)—J. A. T. Robertson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, July 19.

FIRST DIVISION.

(SINGLE BILLS).

[Lord Dewar, Ordinary.

CAREY *v.* CAREY'S TRUSTEES AND OTHERS.

Process — Jury Trial — Postponement of Trial — Material Witness Abroad — Address of Material Witness Unknown to Pursuer—Act of Sederunt, November 19, 1910.

The pursuer in an action which had been remitted by the Lord Ordinary to the sittings for jury trial, moved for postponement of the trial on the ground that one material witness was abroad, that the address of another material witness was unknown to the pursuer, and that neither of these witnesses would be available on the day fixed for the trial.

Held that these were not sufficient grounds for postponement, and the motion *refused.*

William Carey, *pursuer*, brought an action against the trustees of the late Frederick Charles Carey and others, *defenders*, for reduction of a will executed by the said Frederick Charles Carey. The summons was signeted on 27th January 1912 and called on 20th February. On 19th March the production was held satisfied and the adjustment continued until 14th May. Issues were approved on 22nd May, when a diet of trial was fixed for 21st November. On 27th June the defenders moved the Lord Ordinary (DEWAR) to remit the case to the sittings for trial. This motion was opposed by the pursuer, but was granted by the Lord Ordinary, and the trial was thereafter fixed for 26th July. On 19th July the pursuer moved in Single Bills for postponement of the trial on the ground that two material witnesses would not be available if the trial took place on the date fixed, as the one was in Switzerland and he was unable to communicate with the other, who was of roving habits, and whose present address was unknown to him. The motion was opposed by the defenders.

LORD PRESIDENT—This is a motion for the postponement of a trial which has been fixed for the sittings and was to have been tried next Friday. As your Lordships are aware, the practice in jury trials has been very much modified by a recent Act of Sederunt, which swept away a great deal of the somewhat cumbrous and antiquated procedure which formerly obtained, and under the present Act of Sederunt the general scheme for the disposal of jury trials—a scheme which I may say was entirely conceived in the interest of the public—is that jury trials should if possible be tried by the Lord Ordinary. If, however, the Lord Ordinary should be unable to give a day for the trial before the next ensuing sittings, then it is intended the trial should take place at the sittings in order to avoid delay. In this case the Lord Ordinary was applied to to fix a day for the trial after the adjustment of issues, which took place on 22nd May, but he could not give a day till November. Accordingly the defenders took advantage of their right to move the Lord Ordinary to remit the case to the sittings for trial. It was in the power of the pursuer to object to this, as he did, and give any good reason why he could not be ready for trial then, but the Lord Ordinary did not consider the reasons then tabled were sufficient, and he sent the case to the sittings. It is still perfectly competent, notwithstanding that, that either party should come to us and ask that the trial should be postponed, but I wish to lay it down for the guidance of the profession that such a motion will not be granted unless very strong grounds can be shown for interfering with the decision of the Lord Ordinary, or unless there has been a change of circumstances since the date of the Lord Ordinary's interlocutor, *e.g.*, the death or illness of one of the parties.

That being the general rule, I come to the application for postponement in this case. I cannot see that we have before us any good grounds for interfering with what the Lord Ordinary has done. There has been no undue haste on the part of the pursuer. The summons was signeted on 27th January 1912, but the pursuer, who has in his hands the progress of a case in its early stages, did not have the production held satisfied till 19th March, and the adjustment of the record was continued until the beginning of the summer session. Now all along the pursuer must have known that the trial was coming on, but